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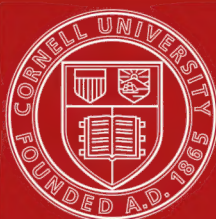
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A selection of cases on the law of bills



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A SELECTION OF CASES
ON THE
LAW OF BILLS AND NOTES
AND OTHER NEGOTIABLE PAPER.

WITH
FULL REFERENCES AND CITATIONS, AND ALSO AN INDEX
AND SUMMARY OF THE CASES.

*PREPARED FOR USE AS A TEXT-BOOK IN HARVARD
LAW SCHOOL.*

BY
JAMES BARR AMES,
BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN TWO VOLUMES.
VOL. I.

BOSTON:
SOULE AND BUGBEE.
1881.

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BY JAMES BARR AMES.

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P R E F A C E.

THAT the innovation in the method of legal education, which was introduced by Professor Langdell's "Cases on Contracts," has proved a marked success in the Harvard Law School, is well known to all those who are familiar with the history of that School during the last ten years.

As a book for the student, for whom it is primarily intended, this collection of cases follows substantially the plan of the "Cases on Contracts."

With the design of rendering these volumes useful to the practising lawyer also, the editor has attempted to collect in foot-notes all the cumulative and adverse authorities, English and American, upon the points decided in the principal cases, indicating by the words *accord* and *contra* whether these additional cases agree or disagree with the decisions in the principal cases.

In the Summary, the editor, while aiming to state as concisely as possible the actual result of the decisions, has ventured to express with considerable freedom his opinions upon the points decided. The reasons for those opinions will be set forth more fully than the necessary limits of a summary would permit, in a short treatise upon the law of Bills and Notes, which is now in preparation.

It is proper to add that the numerous treatises on Bills and Notes have been freely consulted for authorities, and that Sir John Byles's book has been found extremely serviceable as a guide to the English cases. But, above all, the editor must acknowledge his great indebtedness to Professor Langdell, not only for the plan of these volumes, but also for numerous suggestions in regard to the arrangement of the cases, and in the preparation of the Summary. It is only just to say that the credit of very much of what seems to the editor the most valuable part of the Summary belongs, not to the pupil, but to the master.

JAMES BARR AMES.

CAMBRIDGE, June 1, 1881.

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		<i>Merchants' Bank v. Birch</i>	ii. 426
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ADDENDA ET CORRIGENDA.

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- Page 14, note 6. Add *Almy v. Winslow*, 126 Mass. 342, *contra*.
 “ 20, “ 3. Add See also *Sibree v. Tripp*, 15 M. & W. 23.
 “ 23, “ 1, ¶ 2. Add *In re Wrentham*, 2 Low. 119; *Garland v. Scott*, 15 La. An. 143; *Daggett v. Daggett*, 124 Mass. 149 (*semble*); *Gilbert v. Collins*, 124 Mass. 174, 176 (*semble*).
 “ 49, “ 1, ¶ 2. Add But see *Haddock v. Woods*, 46 Iowa, 433; *American Co. v. Clark*, 47 Iowa, 671; *Klauber v. Biggerstaff*, 47 Wis. 551.
 “ 49, “ 2. Add See *Taylor v. Neblett*, 4 Heisk. 491.
 “ 57, “ 2. Add *Daggett v. Daggett*, 124 Mass. 149.
 “ 88, “ 3, ¶ 1. Add *Protection Co. v. Bill*, 31 Conn. 534; *Stillwell v. Craig*, 58 Mo. 24, in which cases the instruments contained words of negotiability.
 “ 94, “ 5. Add *Cisne v. Chidester*, 85 Ill. 523.
 “ 97, “ 1. Add *Frank v. Wessels*, 64 N. Y. 155, and omit the case from Connecticut.
 “ 138. The words “Dorking, Surrey, 24th Aug. — John Cogan Francis — Thomas Newham, Manager — London — 33 Gracechurch Street, London,” should be in italics.
 “ 143, “ 2. For “3 C. L. R. 933” read “11 Ex. 166,” and add *Willans v. Ayers*, 3 App. Cas. 133.
 “ 185, “ 1, ¶ 2. Add *Wakefield v. Greenhood*, 29 Cal. 597.
 “ 185, “ 1, ¶ 3. Add *Nelson v. First Bank*, 48 Ill. 36.
 “ 194, “ 2. Add *Read v. Marsh*, 5 B. Mon. 8.
 “ 225, “ 1, ¶ 5. Add *Central Trust Co. v. First Bank*, 101 U. S. 68.
 “ 233. Add in a note to *Bishop v. Hayward*: ²*Howe Co. v. Hadden* (U. S. C. Ct.), 6 C. L. J. 446; *Carstens v. Little*, 5 Ill. 410; *Grimes v. Newell*, 7 Blackf. 319; *Palmer v. Whitney*, 21 Ind. 58; *Oberle v. Schmidt*, 86 Pa. 221, *accord*. — ED.
 “ 235, “ 1. Add *Phoenix Co. v. Fuller*, 3 All. 441 (*semble*), *accord*.
 “ 245, “ 1. Add *Ex parte Yates*, De G. & J. Bank. 137, *contra*.
 “ 270, ¶ numbered 2. Add See also *Good v. Martin*, 95 U. S. 90.
 “ 271, ¶ c. Add But see *Williams v. Obst*, 12 Bush, 266.
 “ 272, ¶ (1). Add “Indiana.”
 “ 272, ¶ (2). Add *Arnot v. Symonds*, 85 Pa. 99.
 “ 319, note 1, ¶ 2. Add *Agee v. Medlock*, 25 Ala. 281; *Ticonic Bank v. Bagley*, 68 Me. 249; *Whitten v. Hayden*, 9 All. 408; *Spofford v. Norton*, 126 Mass. 533.
 “ 328, note 3, ¶ 2. Add *Hays v. Hathorne*, 74 N. Y. 486.
 “ 331, “ 1. Add *Smoot v. Morehouse*, 8 Ala. 370; *Hersey v. Elliot*, 67 Me. 526; *Hughes v. Nelson*, 29 N. J. Eq. 547 (*semble*).

- Page 357, note 1. For *Foster v. Simmons* read *Murrell v. Jones*, and for "585;" read "565, 583."
- " 389, " 1, ¶ 5. Add *McCarty v. Hall*, 13 Mo. 480.
- " 394, " 1, ¶ 1. Add *Mudge v. Bullock*, 83 Ill. 22; *Slawson v. Loring*, 5 All. 340 (explained in *Roby v. Phelon*, 118 Mass. 541); *George v. Cutting*, 46 N. H. 130.
- " 394. " 1, ¶ 3. Add but see *Brown v. Donnell*, 49 Me. 421, 425.
- " 395, line 16. For "Martin¹" read "Martin²," and change note 7 to note 2.
- " 447, note 1, ¶ 2. For "passes no title" read "gives no rights."
- " 461, " 1, ¶ 1. Add *Beals v. Neddo*, 10 C. L. J. 187; *Hogan v. Moore*, 48 Ga. 156; *Briggs v. Ewart*, 51 Mo. 249 (*semble*).
- " 466, " 1. Add *Gordon v. Wansey*, 21 Cal. 77 (*semble*); *Bradley v. Ward*, 6 Blackf. 190; *Wilbour v. Turner*, 5 Pick. 526 (*semble*); *Grant v. Kidwell*, 30 Mo. 455; *Bryant v. Ritterbush*, 2 N. H. 212; *Newell v. Gregg*, 51 Barb. 263; *Vatterlien v. Howell*, 5 Sneed, 441 (*semble*).
- " 473, " 1. Add *Himmelman v. Hotaling*, 40 Cal. 111, *accord*.
- " 493, " 1, line 1. Add *Van Patton v. Beals*, 46 Iowa, 62.
- " 526, " 1, ¶ 1. Add *Michigan Bank v. Eldred*, 9 Wall. 544; *Angle v. N. W. Co.*, 92 U. S. 330; *Androscoggin Bank v. Kimball*, 10 Cush. 373; *Mechanics' Bank v. Schuyler*, 7 Cow. 337, n.; *McArthur v. McLeod*, 6 Jones (N. Ca.), 475.
- " 547, " 2, last line, after *v. add*: *Watson*, 71 Ill. 456; *Holmes v. Hale*, 71 Ill. 552; *Nebeker v. Cutsinger*, 48 Ind. 436; *Glenn v. Porter*, 49 Ind. 500; *Kimble v. Christie*, 55 Ind. 140; *McDonald v. Muscatine Bank*, 27 Iowa, 319; *Douglas v. Matting*, 29 Iowa, 498; *Abbott v. Rose*, 62 Me. 194; *Shirts v. Overjohn*, 60 Mo. 305 (overruling *Corby v. Weddle*, 57 Mo. 452); *Frederick v. Clemens*, 60 Mo. 813; *Citizens' Bank v. Smith*, 55 N. H. 593; *Chapman v. Rose*, 56 N. Y. 137; *Ross v. Doland*, 29 Oh. St. 473; *Winchell v. Crider*, 29 Oh. St. 480; *Phelan v. Moss*, 67 Pa. 59 (*semble*), in which cases the defendants, by reason of their negligence, were held liable to innocent holders for value. — Ed.
- " 580, " 2, ¶ 1. Add *Cooke v. U. S.*, 91 U. S. 389.
- " 587, " 1, ¶ 1. Add *Bradley v. Mann*, 37 Mich. 1.
- " 637, " 1, ¶ 2. Add *Oates v. First Bank*, 100 U. S. 239.
- " 650, " 1, ¶ 3. Add *Nat. Bank v. Brooklyn Co.*, 14 Blatch. 242; affirmed in U. S. S. Ct., 22 Alb. L. J. 189; *Huddell v. Seitzinger*, 1 Am. L. Rev. N. s. 503.
- " 667, " 1, ¶ 1. Add See *Austin v. Curtis*, 31 Vt. 64.
- " 668, " 1, ¶ 4. Omit *Fulton Bank v. Phoenix Bank* and the four cases following.
- " 676, " 5. Add *Cromwell v. Co. of Sac*, 96 U. S. 51; *Murphy v. Lucas*, 58 Ind. 360; *Scott v. Seelye*, 27 La. An. 95; *Vinton v. Peck*, 14 Mich. 287; *Daniels v. Wilson*, 21 Minn. 98; *Grand Rapids Co. v. Sanders*, 17 Hun, 552; *Bailey v. Smith*, 14 Ohio St. 396 (*semble*); *Bange v. Flint*, 25 Wis. 544.
- " 714, ¶ 2. Add *Doll v. Rizotti*, 20 La. An. 263; *Farrell v. Lovett*, 28 Me. 326; *Witte v. Williams*, 8 S. Ca. N. s. 290; *Kelly v. Whitney*, 45 Wis. 110.

- Page 734, note 1, ¶ 1. Add *Shultz v. Payne*, 7 La. An. 222; *Waldron v. Young*, 9 Heisk. 777.
- “ 734, “ 1, ¶ 2. Add *Emmons v. Meeker*, 55 Ind. 321.
- “ 741, “ 3, ¶ 1. Add *West St. Louis Bank v. Shawnee Bank*, 95 U. S. 557; *In re Irving*, 17 N. B. R. 22; *Palmer v. Whitney*, 21 Ind. 58; *Heffron v. Hannaford*, 40 Mich. 305; *Pooley v. Whitner*, 10 Heisk. 629; *Tompkins v. Maden*, 5 W. Va. 216, *accord*. See also *Nat. Bank v. Law*, 127 Mass. 72; *Nat. Bank v. McDonald*, 127 Mass. 82; and add *Ex parte Estabrook*, 2 Low. 547; *Freeman's Bank v. Savery*, 127 Mass. 75, *contra*.
- “ 741, note 3, ¶ 2. Add *Michigan Bank v. Eldred*, 9 Wall. 544; *Blodgett v. Weed*, 119 Mass. 215; *Tevis v. Tevis*, 24 Mo. 535.
- “ 748, “ 1, ¶ 7. Add *Down v. Halling*, 4 B. & C. 330; *Greenwell v. Haydon* (Ky. 1880), 9 Reporter, 681.
- “ 791, “ 1, ¶ 3. Add *Cromwell v. Co. of Sac*, 96 U. S. 51; *Gilbough v. Norfolk R. R.*, 1 Hughes C. C. 410; *Kelly v. Whitney*, 45 Wis. 110.
- “ 807. Add in a note to *De Silva v. Fuller*, *Godin v. Bank of Commonwealth*, 6 Duer, 76, *accord*. — Ed.

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- Page 1, note 1, ¶ 1. Add *English v. Board*, 6 Ind. 437; *Whitaker v. Hartford Co.*, 8 R. I. 47.
- “ 1, “ 1, ¶ 2. Add *Aurora v. West*, 7 Wall. 105; *Langston v. S. Ca. R. R.*, 2 S. Ca. N. S. 248.
- “ 4, “ 4, ¶ 2. Add *In re East of England Co.*, 4 Ch. Ap. 14, *accord*.
- “ 62, “ 2, ¶ 5. Add *Brown v. McElroy*, 52 Ind. 404; *Howell v. Adams*, 68 N. Y. 314; *Finkbone's Appeal*, 86 Pa. 368.
- “ 95, “ 4, ¶ 1. Add *Holland v. Clark*, 32 Ark. 697; and at end of paragraph, the word *accord*.
- “ 135, “ 2, ¶ 2. Add *Doolittle v. Ferry*, 20 Kas. 230; *First Bank v. Nat. Bank*, 20 Minn. 63.
- “ 168, “ 1, ¶ 1. Add *Kimmell v. Bittner*, 62 Pa. 203; *Byers v. Harris*, 9 Heisk. 652.
- “ 203, “ 6, ¶ 5. For “In,” in the last sentence, read “See,” and omit all after “(semble).”
- “ 242, “ 1, ¶ 4. Add But see *Hussey v. Sibley*, 66 Me. 192, 196.
- “ 255, “ 1, ¶ 4. Add *Dickinson v. Edwards*, 77 N. Y. 573.
- “ 346, “ 1. Add *Cox v. Nat. Bank*, 100 U. S. 704; *Ricketts v. Pendleton*, 14 Md. 320; *Selden v. Washington*, 17 Md. 379, *contra*.
- “ 366, “ 3, ¶ 3. Add *Stanley v. Farmers' Bank*, 17 Kas. 592; *De la Hunt v. Higgins*, 9 Abb. Pr. 422; *Walmsley v. Acton*, 44 Barb. 312; *Ashland Co. v. Wolf* (Pa. 1879), 7 Reporter, 247; and conf. *Stephenson v. Dickson*, 24 Pa. 148.
- “ 379, “ 2, ¶ 1. Add *Cromer v. Platt*, 37 Mich. 132.
- “ 518, “ 2, ¶ 1. Add *Bank v. McGuire*, 33 Ohio St. 295.
- “ 585, “ 2, ¶ 1. Add *Swett v. Southworth*, 125 Mass. 417; *Darnell v. Morehouse*, 45 N. Y. 64; *Mauney v. Coit*, 80 N. Ca. 300. Same note, ¶ 2, line 2, add *Small v. Franklin Co.*, 99 Mass. 277; *Cook v. Beech*, 10 Humph. 412.
- “ 642, “ 2, ¶ 2. Add See *Dawson v. Kearton*, 3 Sm. & G. 186, 191, per Sir John Stuart, V. C.

CASES ON BILLS AND NOTES.

CHAPTER I.

FORMAL REQUISITES.

SECTION I.

A Bill must contain an Order.

RUFF v. WEBB.

AT NISI PRIUS, CORAM LORD KENYON, C. J., MAY 24, 1794.

[*Reported in 1 Espinasse, 129.*]

ASSUMPSIT for work and labor, with the common counts.

Plea of the general issue.

The action was brought to recover the amount of wages due by the defendant to the plaintiff.

The plaintiff had been servant to the defendant, and, on his discharging him from his service, had given him a draft for the amount of his wages on an unstamped slip of paper, in the following words:—

“Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account.”

This draft the plaintiff had taken, but it did not appear that he had ever demanded payment of it from Mr. Nelson, to whom it was addressed.

It was given in evidence on the part of the defendant, that he lived in the country, and kept cash with Mr. Nelson, in London, and that he paid all his bills in that manner, by drafts on Nelson; that the plaintiff knew that circumstance, and took the draft without any objection, and that if he had applied to Nelson, that it would have been paid. This evidence was relied on as a discharge, and bar to the action.

Shepherd, for the plaintiff, contended that the only mode by which this could operate as a bar to the action was by taking the draft in question as a bill of exchange, in which case, under Stat. 3 & 4 Ann.

c. 9, § 7, it is declared, that if any person shall accept a bill of exchange in satisfaction of a debt, that the same shall be deemed a full and sufficient discharge, if the person so accepting such bill for his debt shall not take his due course, by endeavoring to get the same accepted and paid, and making his protest for non-acceptance or non-payment; but he contended, that, in point of substance, it was not a bill of exchange, but a mere request to pay money, not accepted by Nelson, or such as could put the plaintiff into any better situation with respect to his demand. But if it was taken as a bill of exchange, that it could not be given in evidence at all, as it was not stamped.

It was answered by the defendant's counsel, that the plaintiff's having accepted the draft as payment was a waiver of every objection to it, and that he was therefore bound by it, and could not recur to the demand for wages.

LORD KENYON said, that he was of opinion that the paper offered in evidence was a bill of exchange; that it was an order, by one person to another, to pay money to the plaintiff or his order, which was in point of form a bill of exchange; that as such it could not be given in evidence, without being legally stamped; and as the only mode in which it could operate as a discharge of the plaintiff's demand was as stated by the plaintiff's counsel; that the plaintiff, in point of law, was therefore entitled to recover.

LITTLE v. SLACKFORD.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., MAY 21, 1828.

[*Reported in Moody & Malkin, 171.*]

DEBT for money paid. The defendant, being indebted to J. S. for work done, gave him an unstamped paper, addressed to the plaintiff, in the following words:—

“MR. LITTLE, — Please to let the bearer have seven pounds, and place it to my account, and you will oblige

“Your humble servant,

“R. SLACKFORD.”

There was also some slight evidence that the defendant had acknowledged the debt.

Comyn, for the defendant, objected that the paper produced was a bill of exchange, and could not be read for want of a stamp, and the other evidence would not warrant a verdict.

LORD TENTERDEN, C. J. I think no stamp is necessary; the paper does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, "You will oblige me by doing it." Even without the paper, the other evidence would probably entitle the plaintiff to a verdict.

*Verdict for the plaintiff.*¹

NORRIS v. SOLOMON.

AT NISI PRIUS, CORAM MAULE, J., FEBRUARY 17, 1840.

[Reported in 2 Moody & Robinson, 266.]

ASSUMPSIT for goods sold and delivered.

Plea: general issue, — *Non assumpsit*.

To prove the amount of the goods sold, the plaintiff called a witness, who said that he was a clerk to Messrs. Oliver & Son, accountants; that he received from them a written account, which had been handed to them by the plaintiff for the purpose of getting in the amount; that he called upon the defendant with that account, and showed it to him, and that a conversation took place between the witness and the defendant, amounting, as it was said, to an admission by the latter that the sum mentioned in the account was due to the plaintiff; but the amount could only be proved by reference to that written account, which was in the following form:—

Mr. SAMUEL SOLOMON, 50 Long Lane, Smithfield,

Dr. to R. NORRIS.

1839.	Jan. 22.	To goods	£8 14 0
	May 9.	Ditto	1 6 0
	Sept. 19.	To bill unpaid	19 19 2
	28.	To goods	4 5 5
			<hr/>
			£34 4 7
	Aug. 27.	Cash	£3
		Ditto	4
			<hr/>
			£7 7 0 0
			<hr/>
			£27 4 7

And at the foot of the account the plaintiff had written the words following:—

¹ Biesenthall v. Williams, 1 Duv. 329, *contra*.

But "Please pay," &c., is a valid order, the word "please" being simply a form of civility. Wheatley v. Strobe, 12 Cal. 92; Spurgin v. McPheeter, 42 Ind. 527. See further, Story, Bills (4th ed.), 43; Tilsley, Stamps (2d ed.), 138; Patterson v. Poindexter, 6 W. & S. 235, per Gibson, C. J. — Ed.

"Mr. SOLOMON, — Please to pay the above account to Messrs. Oliver & Son, 7 Lawrence Lane, and oblige,

"Yours respectfully,

"24th December, 1839.

R. NORRIS."

Bompas, Serjt., for the defendant, objected that the instrument was, in operation of law, a bill of exchange, or order for the payment of money, within the words of the Stamp Act (55 Geo. III. c. 184), and could not be used in evidence without a bill stamp.

The learned judge recalled the witness, to ascertain whether Oliver & Son had any interest in the sum sought to be collected, or whether the account was delivered to them merely as agents of, and for the benefit of, the plaintiff. The witness proved that the latter was the fact; whereupon *Griffen*, for the plaintiff, maintained that the memorandum at the foot of the account did not amount to a bill, or order for the payment of money. Oliver & Son were merely the agents of the plaintiff, to whom he requests the money to be paid, not on their own account, but for him.

Bompas, Serjt., submitted that it made no difference whether the payees were to receive the money for themselves or for the plaintiff; if that circumstance prevented an instrument from amounting to a bill of exchange, half the instruments drawn abroad and intended for bills would not be such, for it was every day's practice to make foreign bills payable to some party in this country, merely as agent for the drawers, and on their account.

MAULE, J. I am of opinion that this is not a bill of exchange, nor any thing like one.

Bompas, Serjt., tendered a bill of exceptions to the ruling of the learned judge; but his lordship said he had no doubt upon the subject; and the document was accordingly, under his lordship's direction, received in evidence.

*Verdict for the plaintiff, with a certificate for immediate execution.*¹

¹ Conf. *Hoyt v. Lynch*, 2 Sandf. 323, in which the court pronounced the following instrument to be a bill of exchange:—

"NEW YORK, Dec. 16, 1847.

MESSRS. SMITH & WOGLOM,

To C. H. HOYT, DR.

To tin-roof, 86 feet by 37½ feet, — 3,225 feet, at 7½ cents	\$241.87
112 feet 3-inch leader	11.20
85 feet of copper gutter, 4s. 6d.	47.81
	<hr/>
	\$300.88

"WILLIAMSBURGH, Dec. 16, 1847.

"MR. J. LYNCH, — Please pay the above bill, — being the amount for tinning your houses on South Sixth Street, — and charge the same to our account; and much oblige
Yours,
SMITH & WOGLOM." — ED.

THE KING v. ELLOR.

OLD BAILEY, MAY SESSION, 1784.

[Reported in 1 *Leach, Crown Law*, 323.]

THIS was an indictment on the Statute 7 Geo. II. c. 22, for forging a certain order for the payment of money. The order was in the following words :—

“MESSRS. SONGER,—Please to send £10 by the bearer, as I am so ill I cannot wait upon you. ELIZABETH WERY.”

THE COURT. The Act of Parliament means such an order for payment of money as, if genuine, the party giving it had a right to make; but this appears to be a mere letter, rather requesting the loan of money than ordering the payment of it. The terms of it do not import any thing compulsory on the part of the drawee to pay it; and, in the case of *Mary Mitchel*, it was determined, by nine judges against one, that the order was not within the meaning of the act; because the direction of it was not positive, and the terms of it did not import that the party giving it had a right to the goods ordered.

The prisoner was acquitted of the felony, but detained; and in July session, 1784, convicted of the misdemeanor.¹

¹ “In *M. Mitchel's* case, the judges seem to have considered the meaning of the word ‘order’ as importing a right on the part of the person who is supposed to have made it, and a duty on the part of the person on whom it is made. It follows, therefore, that, whenever a forged order for the payment of money or for the delivery of goods is drawn in such terms as to induce the world to believe that it *must*, in common honesty and the regular course of things, be complied with, it is within the meaning of the act; but where it seems to leave compliance or refusal *optional*, and applies rather to the *favor* than the *justice* of the person on whom it is drawn, it is not within the penalty of the statute; for, on such an order, the party taking it can place no *reliance*. The terms of it import that compliance *may* be refused; and therefore, if it be refused, he cannot pretend that he is *deceived*; for a man has no right positively to expect performance where requisition is not a *right*, and performance a *duty*. In *Mitchel's* case, it is rather a *desire* that a thing should be done, than an order to do it. A *desire* implies that the party has not a *right*; and it is the usurpation of another's right which the legislature intended to punish and prevent. See *Willoughby's Case*, 2 East, P. C. 582, and *id.* 936;” 1 *Leach*, C. L. 95, note (a).

In *Hamilton v. Spottiswoode*, 4 Ex. 200, an instrument in the following form—“Dear Sir,—We hereby authorize you to pay, on our account, to the order of W. G.,” &c.—was held not to contain an order; *Parke, B.*, remarking, p. 209: “Here there is only an option to pay or not: therefore, this document is not a bill of exchange, but only a warranty, in case the defendant paid.”

Conf. Russell v. Powell, 14 M. & W. 418; s. c. cited in *Ellison v. Collingridge*, *infra*, p. 43.—ED.

SECTION II.

A Note must contain a Promise.

CASBORNE v. DUTTON.

IN THE EXCHEQUER, MICHAELMAS TERM, 1727.

[Reported in Selwyn's *Nisi Prius* (13th Ed.), 329.]

So where the note set forth in the declaration was, "I do acknowledge myself to be indebted to A. in £ , *to be paid* on demand, for value received." On demurrer to the declaration, the court, after argument, held, that this was a good note within the statute, the words "*to be paid*" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent.¹

FISHER, GENT., v. LESLIE.

AT NISI PRIUS, CORAM EYRE, C. J., NOVEMBER 10, 1795.

[Reported in 1 *Espinasse*, 426.]

THIS was an action of assumpsit for money lent, with the common counts.

Plea of the general issue, with notice of set-off.

To establish part of the demand claimed by the plaintiff, he produced a slip of paper signed by the defendant, in the following words, "I O U eight guineas," and offered this in evidence, as proof of so much money due by him to the plaintiff.

Adair, Serjt., for the defendant, objected to its being received. He said that it was offered, either as a promissory note or a receipt for money, for one or other of which it was intended to operate, and in either point of view required a stamp.

It was answered by *Clayton*, Serjt., for the plaintiff, that it was not offered in evidence in either point of view, as stated by the de-

¹ *Shrivell v. Payne*, 8 Dowl. 441; *Mitchell v. Rome R. R.*, 17 Ga. 574; *Kimball v. Huntington*, 10 Wend. 675; *Pepoon v. Stagg*, 1 N. & McC. 102; *Woodfolk v. Leslie*, 2 N. & McC. 585, *accord.* — ED.

fendant's counsel, but as evidence of an account stated and settled between the parties, and a balance due from one party to the other. He compared it to the case of an account settled in the books of parties, and a balance struck, which had been always received as evidence *pro tanto*, without any stamp. To corroborate what he contended for, he gave in evidence a draft by the plaintiff on his banker, in favor of the defendant, of the same date with the paper offered in evidence, and for the same sum.

The Chief Justice said that he was of opinion it was merely an acknowledgment of the debt, and neither a promissory note or a receipt, and admitted it in evidence.

*The jury found a verdict for the defendant.*¹



BLOCK AND ANOTHER v. BELL.

AT NISI PRIUS, CORAM LORD LYNTHURST, C. B., NOV. 26, 1831.

[Reported in 1 *Moody & Robinson*, 149.]

ASSUMPSIT by the holder against the maker of a promissory note, payable to bearer.

The instrument, when produced, was not in the handwriting of the defendant, nor signed by him at the foot, but ran in the following form: "On demand, I promise to pay to A. B. or bearer the sum of £15, for value received;" and was addressed in the margin to the defendant, who wrote across it: "Accepted. J. Bell."

LORD LYNTHURST, C. B., held that this amounted to a promissory note, the instrument containing a promise to pay; and the signature of the defendant, although in terms an acceptance, acting as an adoption of that promise by him.

Verdict for the plaintiffs.

¹ *Israel v. Israel*, 1 Camp. 499; *Childers v. Boulnois*, D. & Ry. N. P. 8; *Tompkins v. Ashby*, 6 B. & C. 541 (*semble*); *Evans v. Philpotts*, 9 C. & P. 273 (*semble*); *Curtis v. Rickards*, 1 M. & G. 46; *Gould v. Coombs*, 1 C. B. 543; *Beeching v. Westbrook*, 8 M. & W. 412 (*semble*), *accord*.

Gray v. Harris, Chitty, Bills (2d ed.), 243, n., *contra*. — ED.

BROOKS v. ELKINS.

IN THE EXCHEQUER, MICHAELMAS TERM, 1836.

[Reported in 2 Meeson & Welsby, 74.]

ASSUMPSIT for money due from the defendant to the plaintiff. The defendant pleaded a set-off.

At the trial before Lord Abinger, C. B., at the London sittings after last Trinity term, the defendant, to prove his set-off, gave in evidence the following document:—

“OCT. 11, 1831.

“I O U £20, to be paid on the 22d instant.

“W. BROOKS.”

It was objected that this was not admissible in evidence, inasmuch as it was not stamped, and that it ought to have been stamped as a promissory note. The learned judge, however, received it in evidence, giving the plaintiff leave to move to increase the damages, if the court should be of opinion that it required to be stamped, and was not therefore admissible in evidence. The plaintiff recovered a verdict for £35, the jury deducting the £20 for the I O U.

Maule, on a former day in this term, moved to increase the damages. This is not the case of an ordinary I O U, which, being nothing but a bare admission of a debt, is evidence only from which the law will imply a promise to pay the money. But this contains an express promise to pay the money on a day certain, and is in effect a promissory note, and ought to have been stamped as such, the court having granted a rule *nisi*.

Erle now showed cause. It is quite clear that an I O U does not require a stamp; and, if so, why should the simply adding “to be paid on a given day” render a stamp necessary? The ordinary I O U shows that the parties stand in the relation of debtor and creditor, and this does no more. [PARKE, B. A case may be put very close to this, “I O U £20, to be paid on demand.” The question is, whether it imports a promise. If it does, it requires a stamp.]

Per Curiam. This is either a promissory note, to constitute which no particular form of words is requisite, or it is an agreement for the payment of money above the sum of £10; and, in either view of the case, it requires a stamp.

*Rule absolute.*¹

¹ *Waithman v. Elsee*, 1 C. & K. 35; *Dullea v. Emery*, 2 Cr. & D. C.C. 506, *accord*. — Ed.

ELLIS AND WIFE v. MASON.

IN THE QUEEN'S BENCH, EASTER TERM, 1834.

[Reported in 7 Dowling, 598.]

THIS was a rule for setting aside a nonsuit and entering a verdict for the plaintiff, on the ground of the improper rejection of evidence. The cause was tried before the sheriff, and at the trial a document was produced in evidence as a promissory note. It was in the following form: "John Mason, 14th Feb. 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash as per loan, in promise of payment of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother. £14." The question was, whether this document amounted to a promissory note or not. The sheriff decided that it was, and required stamping; and the plaintiff was accordingly nonsuited.

Martin supported the rule. It was true, as decided in the case of *Brooks v. Elkins* and *Wheatley v. Williams*,¹ that no particular form of words was necessary to constitute a promissory note. But in both those cases, as well as all others of the same class, there was an undertaking, either express or implied, to pay in money. But here the undertaking, if any, was to pay in thanks. It could only be considered as a grateful acknowledgment of owing money, and therefore could not require a stamp. In no part of it could any undertaking to pay be found.

WILLIAMS, J. The instrument here is not in the ordinary form of a promissory note. The question is, first, whether there is not an express statement of an advance of a loan of money to the person who has given this paper. That is perfectly clear. The question then is, whether the party does not impliedly undertake to pay that money. I think he does undertake to pay it. The introduction of terms of gratitude does not destroy the promise to pay. So far as the instrument is concerned, they merely amount to redundancy of expression, and should not interfere with its operation. I think, therefore, that it ought to have been stamped as a promissory note, and, as it was not, the sheriff was right in rejecting it. The present rule must be discharged.

Rule discharged.

¹ 1 Mee. & W. 533.

TAYLOR, ADMINISTRATRIX OF BARBARA TAYLOR, DECEASED, v.
STEELE.

IN THE EXCHEQUER, APRIL 21, 1847.

[Reported in 16 Meeson & Welsby, 665.]

ASSUMPSIT for money lent, interest, and money due on an account stated.

Pleas: *non assumpsit*, and the Statute of Limitations.

At the trial, before Alderson, B., at the last Northumberland assizes, it appeared that the action was brought by the plaintiff as administratrix of Barbara Taylor, to recover £170 for money lent by Barbara Taylor to the defendant, with interest thereon. On behalf of the plaintiff, a witness was called, who stated that in July, 1839, he went to the defendant's house; the sheriff's officers were in possession of the defendant's goods. The defendant wished witness to lend him some money; witness said he could not. He saw the defendant again in the evening, when he said his sister (the deceased) had advanced him the money: it was between £150 and £180. The plaintiff tendered in evidence the following document, stamped with a two-shilling receipt stamp:—

“£170.

BERWICK, 16th March, 1841.

“Received from Mrs. Barbara Taylor the sum of £170, for value received; for which I promise to pay her at the rate of £5 per cent, from the above date.

“A. N. STEELE.”

On the part of the defendant, it was objected that the above document was inadmissible in evidence, for want of a stamp; since it was either a receipt, a promissory note, or an agreement,—in neither of which cases it was properly stamped.¹ The learned judge overruled the objection; and the plaintiff had a verdict, leave being reserved for the defendant to move to enter a verdict for him.

Manisty now moved accordingly. It is submitted that this document is a promissory note. No particular form of words is necessary to constitute a promissory note. In *Green v. Davies*,² an instrument in the following form—“Received of A. B. £100, which I promise to pay on demand, with lawful interest”—was held a promissory note. So where the instrument was thus: “John Mason, 14th February, 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash, as

¹ Only so much of the case is given as relates to the second objection; namely, that the instrument was a promissory note.—ED.

² 4 B. & C. 235.

per loan; in promise of payment of which I am truly thankful for, and shall never be forgotten by me, John Mason, your affectionate brother. £14." *Ellis v. Mason*. So, also, where the instrument was in the following form: "Aug. 25, 1837. Memorandum that S. B. Payne had £5 5s. for one month, of my mother Anne Shrivell, from this date, to be paid by me to her. B. Payne." *Shrivell v. Payne*.¹ [PARKE, B. The more recent cases say that implication is not enough, but there must be a positive engagement to pay.]

POLLOCK, C. B. There ought to be no rule. The instrument in question is not a promissory note; for there is no promise to pay the principal sum, but only interest upon it.

PARKE, B. I am of the same opinion. This document is not a promissory note, because it contains no promise to pay the principal, but only the interest. Besides, a promissory note cannot be made for payment of an indefinite sum. I agree that an actual promise is not necessary, if there are words in the instrument from which a promise to pay can be collected.

ALDERSON, B., and ROLFE, B., concurred.

*Rule refused.*²

HYNE v. DEWDNEY.

IN THE QUEEN'S BENCH, APRIL 19, 1852.

[Reported in 21 *Law Journal Reports*, 278.]

DEBT for money lent. Plea: never indebted.

At the trial, before Erle, J., at the Exeter spring assizes, 1852, the following document, signed by the defendant, and unstamped, was put in evidence on behalf of the plaintiff:—

"MODBURY, Feb. 12, 1849.

"Borrowed, this day, of Mr. John Hyne, Stonehouse, the sum of £100 for one or two months; check, £100, on the Naval Bank.

"JAMES DEWDNEY."

It was objected that it required a stamp, either as an agreement or as a promissory note; but the learned judge received it in evidence, and a verdict was returned for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, if the court were of opinion that it required a stamp.

¹ 8 Dowl. P. C. 441.

² *Melanotte v. Teasdale*, 13 M. & W. 216; *Smith v. Smith*, 1 F. & F. 539, *accord*. — ED.

Phinn now moved accordingly. This is either a promissory note or an agreement to pay £100 in one or two months. In *White v. North*,¹ the court held that the document was not a promissory note, because no time for payment was mentioned; but they said it was in substance an agreement. *Shrivell v. Payne*² is very like this case. There the document was in the following form: "Memorandum. Aug. 25, 1837. I, Benjamin Payne, had £5 5s. for one month, of my mother, Anne Shrivell, from this date, to be paid to her by me;" and it was held to be a promissory note.

CROMPTON, J. What is the contract here? Might not the money be sued for at any time?

It could not be sued for at all events until after the expiration of one month.

LORD CAMPBELL, C. J. There is no consideration for the plaintiff's forbearing for a month. It is quite clear that this document does not require a stamp as a promissory note; and, as to its being an agreement, I think there is no binding contract. It is nothing more than a simple acknowledgment of the money having been paid.

WIGHTMAN, J., ERLE, J., and CROMPTON, J., concurred.

*Rule refused.*³

¹ 3 Exch. Rep. 689; s. c. 18 Law J. Rep. (N. S.) Exch. 316.

² 8 Dowl. P. C. 441.

³ *Harrow v. Dugan*, 6 Dana, 341; *Woodfolk v. Leslie*, 2 N. & McC. 585, *contra*.
—ED.

FORWARD AND ANOTHER v. WILLIAM THOMPSON AND JOHN THOMPSON.

IN THE QUEEN'S BENCH, UPPER CANADA, EASTER TERM, 1854.

[Reported in 12 Upper Canada Queen's Bench Reports, 103.]

ASSUMPSIT on an instrument in the following words:—

“£228 7s. 6d.

PORT HOPE, Dec. 8, 1853.

“Three months after date, pay to the order of William Thompson, at Port Hope, the sum of two hundred and twenty-eight pounds seven shillings and six pence, currency, for value received.

(Signed)

“JOHN THOMPSON.”

This was declared upon as a promissory note, made by John Thompson in favor of the defendant, William Thompson, who was stated to have indorsed to the defendant, John Thompson, who indorsed to the plaintiffs.

Pleas denying the making and indorsing, and other pleas not material to mention.

At the trial at Cobourg, before McLean, J., it was objected that the instrument produced was not a promissory note. Several other objections were raised; but it is only material to notice the one on which the judgment of the court proceeded.

Wilson, Q. C., showed cause. This is in fact a bill of exchange not directed to anybody. For want of a drawee it cannot be treated as a bill, but it may be declared on as a promissory note. No precise form of words are essential. “I will pay” would be sufficient; so would “I pay;” and the word *I*, which is omitted here, may be supplied. It must mean *I pay*; for, as it is not directed to any one, nothing else can be meant. [DRAPER, J. Suppose that it had been addressed to a person not *in esse*, would it have been a note?] I think so. [DRAPER, J. If it would have been, then it ought equally to be so in this case.] It is in effect as if the words had been “I, the signer, pay to.” *Davis v. Clarke*, *Gray v. Milner*, *Allan v. Mawson*,¹ *Shuttleworth v. Stephens*, *Edis v. Bury*, *Lloyd v. Oliver*, *Ellison v. Collingridge*.

Richards, contra. There are many cases in which an instrument has been held capable of being treated either as a note or a bill, and the authorities cited on the other side are principally of that nature; but in all of them it will be found that the writing, though ambigu-

¹ 4 Camp. 115.

ous, was perfect in itself. Here is nothing in fact but an incomplete bill of exchange, the drawee's name being omitted. In every other respect, it is perfect as a bill; and this omission of an essential party will not make it a promissory note. Suppose the word "pay" struck out, there would then be no meaning at all; and the simple word "pay" means nothing when it is addressed to nobody. *Robinson v. Bland*,¹ *Dickenson v. Teague*,² *Block v. Bell*, *Miller v. Thompson*, *Rex v. Hunter*,³ *Stoessiger v. South-Eastern R. W. Co.*⁴

DRAPER, J., delivered the judgment of the court.

The first question to be decided is, whether the instrument declared upon in point of law amounts to a promissory note.

The authorities cited (to which may be added *Russell v. Powell*⁵ and *Peto v. Reynolds*) establish clearly, as we think, that it could not have been treated and declared upon as a bill of exchange for want of a drawee; and, if not, then those cases which have been decided on the ground that the instrument in question is made in terms so ambiguous as to make it doubtful whether it be a bill of exchange or promissory note have no application. Then as a promissory note it wants the very essence of a promissory note, that which mainly distinguishes it from a bill of exchange; viz., a promise in terms by the maker, which makes him primarily liable to pay the money. Here are the proper words used, and no others, for drawing a bill of exchange; and, if there had been a drawee, there would have been no room whatever for treating the instrument as any thing but a bill of exchange. But, for want of a drawee, it is incomplete as a bill of exchange; and for want of a promise it appears to us incomplete as a note. It is quite true that no particular words are indispensable, but that any form of words from which the court can extract an expressed intention to promise to pay are sufficient; but in this case we see nothing but an omission to complete, by adding a drawee's name, what in all other respects is a good bill of exchange; and we cannot find either reason or authority for holding that this is sufficient to convert it into a promissory note.

*Rule absolute.*⁶

¹ 2 Burr. 1077.

² 4 Tyr. 452.

³ Russ. & Ry. C.C. 511.

⁴ 23 L. T. Rep. 65.

⁵ 14 M. & W. 418.

⁶ *Allan v. Mawson*, 4 Camp. 115 (*semble*); *Watrous v. Halbrook*, 39 Tex. 572, *accord*.

Conf. Ball v. Allen, 15 Mass. 433; *Ellis v. Wheeler*, 3 Pick. 18. — *Ed.*

JOSEPH L. SMITH AND SETH P. BEERS v. JOHN ALLEN.

IN THE SUPREME COURT OF ERRORS, CONN., NOVEMBER, 1812.

[Reported in 5 Day, 337.]

THIS was an action of assumpsit, originally brought by the defendant in error, against the plaintiffs in error.

The declaration was of the following tenor, viz.: "For that the defendants, in and by a certain writing or note, under their hands, by them well executed, dated the 30th day of August, A.D. 1808, promised the plaintiff, to pay to him, for value received, the sum of ninety-four dollars ninety-one cents, on demand, which is in the words following:

'Due John Allen ninety-four dollars 91 cents, on demand.

'JOSEPH L. SMITH.

'SETH P. BEERS.

'LITCHFIELD, Aug. 30, 1808.'

"Now the plaintiff further says that the defendants, their promise aforesaid not regarding, have never performed the same," &c., "which is to the damage of the plaintiff the sum of 100 dollars," &c.

To this there was a demurrer; and the Superior Court adjudged the declaration sufficient, and rendered judgment for the plaintiff, for 111 dollars 99 cents and costs. And, to reverse this judgment, the present writ of error was brought.

The defendant in error having deceased since the last term of this court, Gould inquired whether the suit could be kept alive within, or in analogy to, the statute, tit. 2, c. 1, § 3? He had no objection, if it could be done.

Per Curiam. Such proceeding may be had, in analogy to the statute.

Whereupon, Elizur Goodrich and Asa Bacon, Jr., Esqs., administrators of the estate of the defendant in error, appeared, waived a *scire facias*, or any further notice, and consented that the cause should proceed to final issue.

Peters, for the plaintiffs in error.

1. An express promise is alleged in the declaration. The instrument declared upon, and recited, furnishes no evidence of such a promise, and is only evidence of the acknowledgment of a debt. [SMITH, J. Have the words "on demand" no meaning? If they have, what is it? Do they not import an agreement to pay on demand?] The word "due" is the only operative word. The instrument, then, imports only the acknowledgment of a debt; and

the words "on demand" mean only that the debt is due *in presenti*. The declaration alleges that the defendants promised expressly to pay the sum contained in the instrument. The instrument itself contains no such promise. *Fisher v. Leslie*.

2. But supposing the declaration to be sufficient, still judgment was rendered for a greater sum than the plaintiff was entitled to recover. The plaintiff laid his damages at 100 dollars. The court rendered judgment for 111 dollars 99 cents. This point is too clear for argument. The judgment must be reversed.

Gould and Bacon, for the defendant in error. The only question in this case is, whether the instrument recited supports the declaration. The declaration, it is true, alleges a promise; and it is equally clear that the writing imports a promise. It is a correct principle that a writing must be declared upon according to its legal import. It has been decided that the act of drawing a bill amounts to an express promise. *Starkey v. Cheeseman*.¹ The word "due" is an acknowledgment of indebtedness. An indebtedness of itself implies a promise. *A fortiori*, an express acknowledgment of indebtedness amounts to an actual promise. *Mountford et al. v. Horton*.²

The words "on demand" show clearly that the money was to be paid on demand. The instrument then imports an express agreement to pay on demand.

SMITH, J. This was a writ of error, brought by the defendants in a court below, to reverse a judgment rendered against them in that court.

The declaration was in common form, in assumpsit, counting upon a promissory note, and demanding 100 dollars damages. To this there was a demurrer and joinder in demurrer. The writing counted upon, and recited in the declaration, was of the following tenor, viz.:

"Due John Allen ninety-four dollars 91 cents, on demand.

"JOSEPH L. SMITH.

"SETH P. BEERS.

"LITCHFIELD, Aug. 30, 1808."

The court below adjudged the declaration to be sufficient, and rendered judgment for the plaintiff, to recover 111 dollars 99 cents damages.

On inspection of the record, it appears that judgment was rendered for a larger sum than is warranted by law, and therefore, on that ground, is clearly erroneous, and must be reversed.

But still the question arises whether this cause shall be remanded to the Superior Court. The decision of this question depends upon

¹ 1 Salk. 128.

² 2 New Rep. 62.

the sufficiency or insufficiency of the plaintiff's declaration. Because if the instrument on which the action is brought, and which is recited in the declaration, will not sustain it, it will be useless to send the cause back for farther trial.

On this subject, in my view, it is very clear that where a writing contains nothing more than a bare acknowledgment of a debt, it does not, in legal construction, import an express promise to pay. It would not appear, from such a writing, that the parties intended the debt should be paid. Their meaning might be, in such case, merely to settle their accounts in writing, with a view to further dealings.

But where a writing imports not only the acknowledgment of a debt, but an agreement to pay it, this amounts to an express contract.

From the writing in question, it is perfectly manifest that the debt acknowledged to be due was to be paid on demand, as fully as if the words "to be paid," or "which we promise to pay," had been inserted next before the words "on demand."

I think, therefore, that the declaration is sufficient, and that the cause ought to be remanded for further proceedings.

The other judges severally concurred in this opinion.

*Judgment reversed, and the cause remanded.*¹

RUSSELL v. WHIPPLE.

IN THE SUPREME COURT, NEW YORK, FEBRUARY, 1824.

[Reported in 2 Cowen, 536.]

ASSUMPSIT on note, by payee against maker. The plaintiff averred that the defendant made his certain note in writing, in the words and figures following, to wit: "Due Lanson Russell, or bearer, one day from date, two hundred dollars twenty-six cents, for value received; as witness my hand, this sixth day of January, in the year of our Lord, 1823." By means whereof, &c., but did not aver that this note had been delivered.

Special demurrer and joinder, assigning the following causes:—

1. That this was not a promissory note within the statute,² though declared on as such.³

2. That the declaration should have shown a delivery of the note.

¹ Brady v. Chandler, *accord*. In Carver v. Hayes, 47 Me. 257, and Cummings v. Gassett, 19 Vt. 308, the notes were negotiable. — ED.

² 1 R. L. 151.

³ Vide Saxton v. Johnson, 10 John. Rep. 418.

It was answered to the first point, that this instrument had all the technical requisites of a promissory note, except a promise to pay expressed; and the following authorities were cited to show it a good note within the statute. 1 Chit. on Bills, 243, n.; *Shuttleworth v. Stevens*, *Allan v. Mawson*,¹ *Brown v. Gilman et al.*,² *Fisher v. Leslie*, President, &c., of *Goshen Road v. Hurtin*,³ *Jerome v. Whitney*,⁴ and 2 Ld. Raym. 1445.

In answer to the second point, *Churchill v. Gardner* ⁵ and *Smith v. McClure*.⁶

E. S. Lee, for the plaintiff.

D. D. Burnard, for the defendant.

The demurrer was noticed as frivolous; and, being accordingly brought on out of its place on the calendar, the court thought it too plain for argument in its regular order, and rendered

*Judgment for the plaintiff.*⁷

FREDERICK A. FRANKLIN v. JOSEPH W. MARCH.

IN THE SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE,
DECEMBER TERM, 1833.

[*Reported in 6 New Hampshire Reports, 364.*]

ASSUMPSIT by the plaintiff as indorsee, upon an instrument, in these words:—

“OCT. 19, 1830.

“Good to Robert Cochran, or order, for thirty dollars, borrowed money.
JOSEPH W. MARCH.”

The case was submitted to the decision of the court, upon the following facts, reported by an auditor.

On the 19th October, 1830, the defendant sold and delivered to Cochran a quantity of hops, and on the same day received of Cochran the said sum of thirty dollars, in part payment for said hops, and thereupon gave Cochran the instrument in question.

On the 15th February, 1831, Cochran indorsed it to the plaintiff, in part payment of a debt due from him to the plaintiff, who on the same day presented it to the defendant for payment. The defend-

¹ 4 Camp. Rep. 115.

² 13 Mass. Rep. 158.

³ 9 John. Rep. 217.

⁴ 7 id. 321.

⁵ 7 T. R. 596.

⁶ 5 East, 476.

⁷ *Johnson v. Johnson*, Minor, 263; *Huyck v. Meador*, 24 Ark. 191; *Carver v. Hayes*, 47 Me. 257; *Sackett v. Spencer*, 29 Barb. 180; *Marrigan v. Page*, 4 Humph. 247; *Bacon v. Bicknell*, 17 Wis. 523, *accord.*—ED.

ant then stated to the plaintiff that he did not know of Cochran's holding any negotiable note against him; that Cochran was then owing him; that he sold the hops to Cochran, as before stated, and received the said thirty dollars in part payment; and had supposed, until it was then shown to him, that the memorandum he gave was in the common form of a receipt; but that he now supposed it was negotiable, and he should be obliged to pay it, and that he would pay it, if the plaintiff would wait a month or so.

The plaintiff waited for several months, and then commenced this suit.

Cochran was indebted to the defendant, upon account, at the time when the instrument was made, and continues to be so indebted.

Hackett, for the plaintiff.

E. Cutts, for the defendant.

PARKER, J. The instrument declared upon in this case is not in the usual form of a promissory note, but no particular form of words seems to be necessary to give it that character. Bayley on Bills, 3; Chitty on Bills, 53; *Casborne v. Dutton*, *Morris v. Lee*, *Chadwick v. Allen*, *Goshen Turnpike v. Hurin*,¹ *Russell v. Whipple*, *Mitchell v. Culver*.²

It has repeatedly been held that the words "value received," though usually inserted, are not essential. 3 Kent's Com. 50; *Poplewell v. Willson*, *McLeod v. Snee*, *Emery v. Bartlett*;* Bayley, 24; Sel. N. P. 336.

The note in this case shows that it is founded upon a sufficient consideration, it purporting, on its face, to have been given for money borrowed; and "good to R. C., or order," is equivalent to a promise to pay R. C., or order.⁴

Judgment for the plaintiff.⁵

¹ 9 Johns. 217.

² 7 Cow. 337.

* *White v. Ledwick*, 4 Doug. 247; *Grant v. Da Costa*, 3 M. & Sel. 351; *Hatch v. Traves*, 11 A. & E. 702; *Derry v. Chambers*, 1 Hud. & B. 433; *Benjamin v. Tillman*, 2 McL. 213; *Kendall v. Galvin*, 15 Me. 131; *Townsend v. Derby*, 3 Met. 363; *Kinsman v. Birdsall*, 2 E. D. Sm. 395; *Hubble v. Fogartie*, 3 Rich. 413; *Leonard v. Walker*, Brayt. 203; *Mehlberg v. Tisher*, 24 Wis. 607, *accord*.

Bailey v. Smock, 61 Mo. 213; *International Bank v. German Bank*, 3 Mo. App. 362, *contra*. — Ed.

⁴ Ld. Raym. 1556.

⁵ Only so much of the case is given as relates to the nature of the instrument in question. — Ed.

⁶ *Hussey v. Winslow*, 59 Me. 170 (*semble*), *accord*.

Palmer v. McLennan, 22 Up. Can. C. P. 258, 565, *contra*.

See *Clark v. Savage*, 20 Conn. 258; *Brown v. Gilman*, 13 Mass. 158.

Conf. Harmon v. James, 7 Ind. 268. — Ed.

BANK OF ORLEANS v. MERRILL, PRESIDENT OF THE CLINTON BANK.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1842.

[Reported in 2 Hill, 295.]

ON demurrer. The Clinton Bank, an association formed under the general banking law, issued a certificate of deposit, payable to the order of S. Benedict at six months, with interest, of which the plaintiff was indorsee. The question raised by the pleadings was, whether an action could be maintained against the bank on this instrument.

N. Hill, Jr., for the defendant.

C. M. Jenkins, for the plaintiff.

Per Curiam. The instrument in question is in effect a negotiable promissory note. We cannot sanction it as the basis of a right of recovery, without disregarding the provisions of the statute against the issue of a spurious and illegal currency. The case is within the principle of *Safford v. Wyckoff*,¹ and *Smith & Warner v. Strong*.² The defendant must have judgment.

*Ordered accordingly.*³

¹ 1 Hill, 11.

² 2 Hill, 241.

³ *Miller v. Austen*, 13 How. 218; 5 McL. 153, s. c.; *Welton v. Adams*, 4 Cal. 37; *Brummagin v. Tallant*, 29 Cal. 503; *Poorman v. Mills*, 35 Cal. 118; *Kilgore v. Bulkley*, 14 Conn. 383; *Carey v. McDougald*, 7 Ga. 84; *Peru Bank v. Farnsworth*, 18 Ill. 563; *Laughlin v. Marshall*, 19 Ill. 390; *Swift v. Whitney*, 20 Ill. 144; *Hunt v. Divine*, 37 Ill. 137; *Drake v. Markle*, 21 Ind. 433; *Lafayette Bank v. Ringel*, 51 Ind. 393; *Bean v. Briggs*, 1 Iowa, 488; *Blood v. Northup*, 1 Kans. 28; *Fells Point Co. v. Weedon*, 18 Md. 320; *Cate v. Patterson*, 25 Mich. 191; *Tripp v. Curtenius* (Michigan, 1877), 9 Chic. L. N. 339; *Fultz v. Walters*, 2 Montana, 165; *Leavitt v. Palmer*, 3 Const. 19, 34 (*semble*); *Barnes v. Ontario Bank*, 19 N. Y. 152; *Pardee v. Fish*, 60 N. Y. 265; *Frank v. Wessells*, 64 N. Y. 155; *Johnson v. Henderson*, 76 N. Ca. 227 (*semble*); *Moore v. Gano*, 12 Oh. 300; *Howe v. Hartness*, 11 Oh. St. 449; *Bellows Falls Bank v. Rutland Bank*, 40 Vt. 377; *Lindsey v. McClelland*, 18 Wis. 481, (*semble*), *accord*.

Austin v. Miller, 4 W. L. J. 527; *Patterson v. Poindexter*, 6 W. & S. 227; *Charnley v. Dulles*, 8 W. & S. 353; *Lebanon Bank v. Mangan*, 28 Pa. 452, *contra*.

Conf. Payne v. Gardiner, 29 N. Y. 146; *Hotchkiss v. Mosher*, 48 N. Y. 478. — ED.

DANIEL W. CURRIER AND ANOTHER v. FREDERICK LOCKWOOD.

IN THE SUPREME COURT OF ERRORS, CONNECTICUT, OCTOBER TERM, 1873.

[Reported in 40 Connecticut Reports, 349.]

ASSUMPSIT, upon a written instrument described as a note, with the common counts; brought originally before a justice of the peace, and appealed to the Court of Common Pleas of Fairfield County, and tried in that court, upon the general issue closed to the court, with notice that the action was barred by the Statute of Limitations, before Brewster, J. The suit was brought June 1, 1872.

In the special count, the plaintiffs averred "that the defendant, in and by a certain writing or note, under his hand by him well executed, dated the 22d day of January, 1863, promised the plaintiffs to pay to them for value received the sum of seventeen dollars and fourteen cents, as by the said writing or note ready in court to be shown appears."

Upon the trial, the plaintiffs offered in evidence the following writing:—

" \$17.14.

BRIDGEPORT, Jan. 22, 1863.

"Due Currier & Barker seventeen dollars and fourteen cents, value received.
FREDERICK LOCKWOOD."

At the time the note was given, the plaintiffs were partners under the name of Currier & Barker.

The plaintiffs claimed, as matter of law, that the writing was a promissory note not negotiable under the statute, and was not barred until seventeen years from its date; also that the facts proved an acknowledgment of the debt, and a new promise, which took it out of the Statute of Limitations.¹ The defendant claimed adversely to each of these claims.

The court ruled adversely to the claims of the plaintiffs, and held that the debt was barred by the Statute of Limitations, and rendered judgment for the defendant to recover his costs.

The plaintiffs moved for a new trial.

Thompson, in support of the motion.

There is no variance. The writing imports a "promise to pay," and it is set forth according to its legal effect. *Smith v. Allen*; *Edwards on Bills*, 131; 1 Am. Lead. Cas. (5th ed.) 383. The acknowledgment

¹ So much of the case as relates to the waiver of the Statute of Limitations is omitted. — ED.

of indebtedness implies a promise to pay, and constitutes a promissory note. *Cummings v. Freeman*,¹ *Marrigan v. Page*,² *Fleming v. Burge*,³ *Brenzer v. Wightman*,⁴ *Brewer v. Brewer*,⁵ *Lowe v. Murphy*,⁶ *Johnson v. Johnson*,⁷ *Harrow v. Dugan*,⁸ *Kilgore v. Bulkley*.⁹ If the instrument is a "note not negotiable," it is not barred by the Statute of Limitations, such notes running seventeen years.

Lockwood, contra.

A note must contain a legal promise for the certain payment of a certain sum. 1 *Parsons on Notes and Bills*, 23, 24; *Story on Promissory Notes*, § 14; *Bouvier's Law Dict.*, *Due Bill*, *Promissory Note*, and *I O U*. An acknowledgment of a debt is not a promissory note. 1 *Parsons on Notes and Bills*, 25; *Byles on Bills*, 11, 28; *Smith v. Allen*, *Beeching v. Westbrook*,¹⁰ *Melanotte v. Teasdale*,¹¹ *Bowles v. Lambert*.¹² The note must contain and must express the *promise* of the debtor to pay the money. 1 *Parsons on Notes and Bills*, 25.

SEYMOUR, C. J. The first question in this case is whether the writing sued upon is a promissory note within the meaning of those words in the Statute of Limitations. The statute is as follows: "No action shall be brought on any bond or writing obligatory, contract under seal, or promissory note not negotiable, but within seventeen years next after an action shall accrue." The instrument sued upon is as follows:—

"\$17.14.

BRIDGEPORT, Jan. 22, 1863.

"Due Currier & Barker seventeen dollars and fourteen cents, value received.

FREDERICK LOCKWOOD."

Promissory notes not negotiable are by the statute above recited put upon the footing of specialties in regard to the period of limitation, and for most other purposes such notes have been regarded as specialties in Connecticut. The instrument, however, to which this distinction has been attached is the simple express promise to pay money in the stereotyped form familiar to all. The writing given in evidence in this case is a due bill, and nothing more. Such acknowledgments of debt are common, and pass under the name of due bills. They are informal memoranda, sometimes here, as in England, in the form "I O U." They are not the promissory notes which are classed with specialties in the Statute of Limitations. The law implies, indeed, a promise to pay from such acknowledgments, but the promise is simply implied, and not express. It is well said by Smith, J., in *Smith*

¹ 2 *Humph.* 143.

⁴ 7 *Watts & Serg.* 264.

⁷ *Minor (Ala.)*, 263.

¹⁰ 8 *Mees. & Wels.* 412.

² 4 *id.* 247.

⁵ 6 *Ga.* 588.

⁸ 6 *Dana*, 341.

¹¹ 13 *id.* 216.

³ 6 *Ala.* 373.

⁶ 9 *id.* 341.

⁹ 14 *Conn.* 383.

¹² 54 *Ill.* 237.

v. Allen, "Where a writing contains nothing more than a bare acknowledgment of a debt, it does not in legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt, but an agreement to pay it, this amounts to an express contract."

In that case, the words "on demand" were held to import and to be an express promise to pay. That case adopts the correct principle; namely, that to constitute a promissory note there must be an express as contradistinguished from an implied promise. The words "on demand" are here wanting. The words "value received," which are in the writing signed by the defendant, cannot be regarded as equivalent to the words "on demand." The case of *Smith v. Allen* went to the extreme limit in holding the writing there given to be a promissory note; and we do not feel at liberty to go further in that direction than the court then went.

A new trial is not advised.

In this opinion PARK and CARPENTER, JJ., concurred.¹

¹ FOSTER, J., with whom Phelps, J., concurred, delivered a dissenting opinion, the material part of which is contained in the following extract:—

"Dissents FOSTER, J. That the paper before us is more correctly described as a due bill than as a promissory note is unquestionable. That it would be regarded among business men, in the daily transactions of life, as conferring the same rights and imposing the same liabilities as a promissory note, seems to me equally unquestionable. It was so regarded by the parties to it. It was so treated and so spoken of whenever it was alluded to. This is manifest from the record: 'The defendant came into the store of said Barker (one of the plaintiffs), and said to him, "Have you that note?" or, "Where is that note?" and that he "wished to settle it." Barker told him "the note was in Mr. Stevens's hands," &c.' Any writing importing a debt, and an obligation to pay it, especially if it contains the words 'for value received,' is, in the popular judgment, a note. This instrument is clearly of that character. It was clearly the intent of the parties so to make it; and it is evident that they supposed they had so made it. To hold otherwise would seem to be contrary to the understanding and intent of the parties."

The following cases accord with the decision in the principal case: *McLain v. Rutherford*, Hempst. 47 (*semble*); *Gray v. Bowden*, 23 Pick. 282; *Davis v. Allen*, 3 Comst. 168 (*semble*); *Hotchkiss v. Mosher*, 48 N. Y. 478 (*semble*); *Read v. Wheeler*, 2 Yerg. 50 (*overruled*), *accord*.

But see *Fleming v. Burge*, 6 Ala. 373; *Lowe v. Murphy*, 9 Ga. 338; *Jacquin v. Warren*, 40 Ill. 459 (*semble*); *Kalfus v. Watts*, Litt. (S. C.) 197; *Finney v. Shirley*, 7 Mo. 42; *McGowen v. West*, 7 Mo. 569; *Payne v. Gardiner*, 29 N. Y. 146 (*semble*); *Cummings v. Freeman*, 2 Humph. 143, *contra*.

Conf. Brewer v. Brewer, 6 Ga. 587; *Bowles v. Lambert*, 54 Ill. 237. — ED.

SECTION III.

The Order or Promise must be unconditional.

SMITH v. BOHEME.

IN THE KING'S BENCH, MICHAELMAS TERM, 1714.

[Reported in Gilbert, 98.]

ERROR, judgment in C.B. upon a note to pay £72 upon demand for value received, or render the body of A. B., &c., to the Fleet before such a day, laid upon the Statute of Promissory Notes.

Serjeant *Richardson*, for the plaintiff in error, assigned for error, that this note being to become surety for a debt only upon a contingency was not within the statute, which designed only to give a currency to notes absolutely for money.

That it cannot be made at common law; for if a man will bring his action upon a statute, he must rely upon that title, and cannot assist it by restoring back to common law. 9 Rep. 74; Noy, 147.

Serjeant *Cheshire*, contra. The intent of the act was only to make the note in nature of a specialty, and serve instead of an express consideration; and there will be no reason to distinguish this from the common cases, for at first it was only a note payable within such a time after demand; and now the defendant has not rendered that it is out of the case, and it must be taken as an absolute note for the money.

But, supposing it to be out of the statute, it will be good at common law. *Pro valore recepto* imports a consideration, *assumpsit pro opere et labore facto* makes a good consideration; so *pro præmissis*. 2 Lev. 153. And the mention of the statute will not hurt. Vent. 103. An action for taking away his wife, *contra formam stat.*, was held well, though no statute in the case, and those words were rejected.

Richardson, reply. This agreed not to be an indorsable note from the time of making it, which is the intention of the statute, and nothing subsequent can make it so.

Pro valore recepto: here is no averment of consideration, but only a recital that there is such a note.

As to the case in Vent., there is a difference between the mention of a statute where there is none at all and where there is one; but the plaintiff has mistaken his case upon it.

PARKER, C. J. It is not laid that he made such a note for value

received, which is only a recital of the words of the note; and then comes *fuit onerabil. vigore stat. et sic onerabil. existens in cons. inde super se ass.*, so that the chargeableness by force of the statute is made the consideration.

EYRE, J., accordant. The statute intended only to make notes for money negotiable for the ease of merchants. Suppose a declaration were on *indebit. assumpsit* generally *pro opere et labore fact.*, I question whether it would be good. *Adjournatur.*¹

JOSSELYN v. LACIER.

IN THE KING'S BENCH, IN ERROR, EASTER TERM, 1715.

[Reported in 10 Modern Reports, 294, 316.]

THIS was a writ of error upon a judgment given in the Court of Common Pleas in an action of *assumpsit*, where the plaintiff declared that Evans drew a bill upon Josselyn, requiring him to pay Lacier seven pounds every month (the first payment to begin in December, about two months after the date of the note) out of the growing subsistence of Evans, and place it to his account; that Lacier carried the note to Josselyn, who accepted it, and promised to pay it, *secundum tenorem billæ*; by which acceptance, according to the custom of merchants, he became liable; and that afterwards he refused to pay, &c.

The defendant pleads *non assumpsit infra sex annos*; and judgment was given for the plaintiff, upon which judgment the present writ of error is brought.

Branthwayt, Serjt., who was of counsel for the plaintiff in error, owned that the defendant's plea was naught; for the promise being to do an act upon a future day, the plea should not have been *non assumpsit*, &c., but that *causa actionis non accrevit infra sex annos*. But he insisted that the declaration was vicious; for the plaintiff declared upon the custom of merchants concerning bills of exchange, and yet sets forth such a bill as in the very nature of it appears not to be a bill of exchange. It is essential to a bill of exchange to be negotiable, which this cannot possibly be; because it is to pay upon a contingency, "out of the growing subsistence" of Evans. If it should be objected that there is set forth in the declaration an express promise to pay, it may be answered that this will not help the matter; because a naked promise, a *nudum pactum*, is not in law a

¹ *Morgan v. Jones*, 1 Cr. & J. 162; *Smalley v. Edey*, 15 Ill. 324, *accord.* — ED.

sufficient foundation for an action. There must be a consideration; and the consideration must be particularly set forth in the declaration, that so the court may judge whether it be sufficient to maintain an action. In the case of *Foster v. Smith*,¹ the plaintiff declared that the defendant, being indebted, promised to pay; and it was held that the consideration was not sufficiently set forth, for that the plaintiff ought to have specified the cause of the debt, as money lent, goods sold or delivered, &c. In the case of *Fricquet v. Manly*,² "*parvulum tempus* he should forbear," is held not a good consideration; because no certain judgment can be made what portion of time that is. A consideration of forbearance for a convenient time will be good; but then there must be an averment how much time he did stay.³ In the case of *Wife v. Wife*,⁴ in an assumpsit by an executor the plaintiff declared that the defendant being indebted to the testator in the sum of twenty pounds, according to an agreement between them made, promised to pay; and after verdict for the plaintiff, upon *non assumpsit*, the judgment was arrested for want of setting forth this agreement. The case of *Pearson v. Ganell*⁵ was strongly insisted upon, as a case in point, to prove that this was not a bill of exchange, and that a declaration upon it as a bill of exchange was erroneous.

Mr. Reeves, in affirmance of the judgment, argued:—

First, that this was a good bill of exchange; for the words "out of my growing subsistence" do either import some interest or effects that the acceptor had of the drawer in his hands, or they are idle and insensible. If the former, then the case is in effect this: A draws a bill upon B, requiring him to pay C so much money out of the money that is in his hands; *non refert* whether B has any money of A actually in his hands, for by his acceptance he is estopped from saying the contrary. But if the words are insensible, then they are surplusage.

Secondly, he argued that, supposing this not to be a good bill of exchange, there was an express promise laid, and a sufficient consideration to support it. Labor and trouble, &c., are sufficient considerations to support an assumpsit, as a valuable one; for almost any consideration, though ever so small, has been held sufficient to support this sort of action. 3 Cro. 77; 1 Sid. 369; 1 Vent. 71, 74. He insisted that the drawing the bill was a request and authority to demand the money, and that the trouble the plaintiff was at in demanding the money was a good consideration.

Branthwayt, Serjt., replied that the going of the plaintiff to demand the money was no part of the contract, nor any advantage to the party that made the promise.

Adjournatur.

¹ Cro. Car. 31.

² 1 Sid. 45.

³ By Windham, J., 1 Sid. 45.

⁴ 2 Lev. 152.

⁵ 4 Mod. 242.

PARKER, C. J., delivered the opinion of the court.

In this case, two points are considerable: first, whether this be a good bill of exchange. We are all of opinion that it is not a bill within the custom of merchants; it concerns neither trade nor credit; it is to be paid out of the growing subsistence of the drawer; if the party die, or his subsistence be taken away, it is not to be paid. It may be never paid, and yet his credit unimpeached; it is not payable "to order," nor "for value received." It does not appear whether the party that is to receive it is to receive it upon account of a former debt, or is to receive a bounty.

As to the second point, viz., whether if the bill, by custom of merchants, is not a good bill of exchange, it may not be supported by the promise. All of us are of opinion that it cannot. For as to that matter, it stands thus: *quorum præmissorum ratione*, &c., and *in consideratione inde* he promised to pay, &c. The word "*inde*" plainly refers to the bill as supported by the custom; and consequently, if that fails, the consideration must do so too.

*The judgment was reversed.*¹

ANDREWS v. FRANKLIN.

IN THE KING'S BENCH, HILARY TERM, 1717.

[Reported in 1 Strange, 24.]

CASE upon a promissory note to pay within two months after such a ship is paid off, and counts upon the statutes.

Branthwayt, Serjt., insisted that this is not negotiable, it being upon a contingency which may never happen. *Jocelyn v. Laserre*, upon a writ of error, was a bill to pay out of the drawer's growing subsistence; and that was held not to be negotiable as a bill of exchange.

Sed per Curiam. The paying off the ship is a thing of a public nature; and this is negotiable as a promissory note.

*Judgment pro quer.*²

¹ "The instrument, or writing, which constitutes a good bill of exchange, according to the law, usage, and custom of merchants, must carry with it a *personal* and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*; it is upon the credit of the *person's* hand, as on the hand of the drawer, the indorser, or the person who negotiates it; he to whom such bill is made payable or indorsed takes it upon no particular *event* or *contingency*, except the failure of the general personal credit of the persons drawing or negotiating the same." Per Lord Ch. J. De Grey, in *Dawkes v. De Lorane*, 3 Wils. 213.—Ed.

² *Evans v. Underwood*, 1 Wils. 262; *Lewis v. Orde*, Cuning. Bills, 113; *Barnsly v. Baldwyn*, 7 Mod. 417, 419 (*semble*), *accord*.

But see *Weidler v. Kauffman*, 14 Oh. 455, 460; *Story*, Bills (4 ed.), 58.—Ed.

APPLEBY v. BIDDOLPH.

IN THE KING'S BENCH, HILARY TERM, 1717.

[Cited in 8 Modern Reports, 863.]

THE note was in these words: "I promise to pay T. M. so much money, if my brother doth not pay it within such a time." Judgment was arrested after a verdict, because the drawer was not the original debtor, but might be a debtor upon a contingency.¹

JENNEY AND OTHERS v. HERLE.

IN THE KING'S BENCH, IN ERROR, JUNE 9, 1724.

[Reported in 2 Lord Raymond, 1361.]

IN an action on the case on several promises, there were five several counts in the declaration: as to four of them, the defendants pleaded *non assumpsit*, and issue was joined upon it; but afterwards the plaintiffs entered a *nolle prosequi* as to them. But the other was upon a bill of exchange, wherein the plaintiff Herle, in the Common Pleas, declared that the defendants, 27th of September, 1720, at, &c., according to the custom of merchants, made a bill of exchange, signed with their own hands, directed to John Pratt, by which the defendant did require the said John Pratt to pay to the plaintiff Herle £1,945 upon demand, *ex moneta per eandem billam mentionata tum fore in his hands spectante ad proprietarios quorundam hereditamentorum vocatorum* the Devonshire mines and quarries, *existente parte denariorum vocatorum* the consideration money *pro emptione*, *Anglice* the purchase, *manerii de West Buckland*; that Pratt refused to accept the bill, whereby the defendants became liable to pay the plaintiff that sum of money; and, being so liable, promised to pay, &c. To this count the defendants demurred in the Common Pleas, and an interlocutory judgment was given for the plaintiff Herle, a writ of inquiry executed, and £1,945 damages found, and final judgment in the Common Pleas for Herle. Upon which the defendants brought a writ of error. And, after argument by Mr. Solicitor-General *Wearg* for the plaintiffs in error, and by Serjeant *Chapple* for the defendant, the judgment of the Common Pleas was reversed by PRATT, C. J., FORTESCUE and RAYMOND, JJ.,—POWYS being absent,—they being of opinion this was not a bill of exchange, but a bare appointment to pay money

¹ Ferris v. Bond, 4 B. & Al. 679; Robbins v. May, 11 A. & E. 213, *accord.* — ED.

out of a particular fund, with a view of having it paid out of which fund the defendants probably drew the bill, and never designed the bill should be payable at all events, but only out of the particular money mentioned in the bill, supposed to be in Mr. Pratt's hands. And it would be very mischievous to make such notes as these, which were but appointments, bills of exchange; for, at that rate, if a tradesman applies to a gentleman for money for his bill, says the gentleman, "I will direct my steward to pay you;" and writes to him, "Pay to J. S. the money mentioned in this bill out of the rents in your hands." The steward has no rents in his hands. It can never be imagined the gentleman should be liable to be sued upon this as upon a bill of exchange. And the case of Jocelin and Lasserre was cited, where a bill was drawn upon an agent of a regiment, "Pray pay out of my growing subsistence," &c., and adjudged no bill of exchange. And though the counsel objected, the reason of that case was because it depended upon a contingency; yet Justice FORTESCUE said the reason was, because it was payable out of a particular fund; and, if that was the reason of it, it is the case in point. There was also cited, in the argument of this case, the case of *Smith v. Boheme*, where the note was "I promise to pay J. S. so much money, or render the body of J. N. to prison before such a day;" and it was adjudged to be no negotiable note within the Act of Parliament, and that an action could not be maintained on that note within that law, because the money was not absolutely payable, but it depended upon a contingency whether he would surrender J. N. to prison or not.

*Judgment was reversed Tuesday, June 9, 1724.*¹

¹ *Banbury v. Lisset*, 2 Stra. 1211; *Haydock v. Lynch*, 2 Ld. Raym. 1563; *Dawkes v. Deloraine*, 2 Bl. 782; 3 Wils. 207, s. c.; *Yeates v. Groves*, 1 Ves. Jr. 280; *Carlos v. Fancourt*, 5 T. R. 482; *Wilks v. Adcock*, 8 T. R. 27; *Jones v. Simpson*, 2 B. & C. 318; *Ockerman v. Blacklock*, 12 Up. Can. C. P. 362; *Corp. of Perth v. McGregor*, 21 Up. Can. Q. B. 459; *Chiene v. Western Bank*, Court of Session, July 20, 1848; *Bayerque v. San Francisco*, 1 McAll. 175; *Waters v. Carleton*, 4 Port. 205; *West v. Forman*, 21 Ala. 400; *Gliddon v. McKinstrey*, 28 Ala. 408; *Hamilton v. Myrick*, 3 Ark. 541; *Blevins v. Blevins*, 4 Ark. 441; *Henry v. Hazen*, 5 Ark. 401; *Owen v. Lavine*, 14 Ark. 389; *Raiguel v. Ayliff*, 16 Ark. 594; *Mills v. Kuykendall*, 2 Blackf. 47; *Nichols v. Davis*, 1 Bibb, 490; *Mershon v. Withers*, 1 Bibb, 503; *Carlisle v. Dubree*, 3 J. J. Marsh. 542; *Curle v. Beers*, 3 J. J. Marsh. 170, 174; *Strader v. Batchelor*, 8 B. Mon. 168; *Lanfear v. Blossman*, 1 La. An. 148; *Legro v. Staples*, 16 Me. 252; *Jackman v. Bowker*, 4 Met. 235; *Sec. Nat. Bank v. Lansing*, 1 Mich. N. P. 181; *Van Vacter v. Flack*, 9 Miss. 393; *Wadlington v. Covert*, 51 Miss. 631; *McGee v. Larramore*, 50 Mo. 425; *Harriman v. Sanborn*, 43 N. H. 128; *Rice v. Porter*, 1 Harr. 440; *Smith v. Wood*, 1 Saxt. 74; *De Forest v. Frary*, 6 Cow. 151; *Worden v. Dodge*, 4 Den. 159; *Morton v. Naylor*, 1 Hill, 583; *Munger v. Shannon*, 61 N. Y. 251; *Kenny v. Hinds*, 44 How. Pr. 7; *Stamps v. Graves*, 4 Hawks, 102, 112; *Crawford v. Cully*, *Wright* (Oh.), 453; *Smurr v. Forman*, 1 Oh. 133; *Reeside*

MACLEED v. SNEE.

IN THE KING'S BENCH, MAY 2, 1727.

[Reported in 2 Strange, 762.]

ERROR of a judgment in C. B., wherein the plaintiff declares that A. B. drew a bill of exchange, dated 25th of May, whereby he requested the defendant, one month after date, to pay to the plaintiff, or order, £9 10s, "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance." And the action is against the defendant upon his acceptance.

It was objected that this was no bill of exchange, because it is not to pay in all events, but is left to the pleasure of the person on whom it is drawn either to advance the money or not; and it was compared to the case of *Jocelyn v. Laserre*, which was to pay out of his growing subsistence, and to the case of *Jenney v. Herle*, which was payable out of a particular fund, and in both cases held to be no bills of exchange.

Sed per Curiam. The quarterly half-pay is a certain fund, which the growing subsistence was not: the mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person. The reason it was held no bill of exchange in *Jenney v. Herle* was because it was no more than a private order to a man's servant.

*Judgment affirmed.*¹

BEARDSLEY v. BALDWIN.

IN THE KING'S BENCH, EASTER TERM, 1741.

[Reported in 2 Strange, 1151.]

A **PROMISSORY** note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note within the statute.²

v. Knox, 2 Whart. 233; *Kinney v. Lee*, 10 Tex. 155; *Lindsay v. Price*, 33 Tex. 280; *Andrews v. Harvey*, 39 Tex. 123; *Averett v. Booker*, 15 Gratt. 163; *Blake v. Coleman*, 22 Wis. 415, *accord*.

Ubsdell v. Cunningham, 22 Mo. 124, *contra*.

Conf. Chickering v. Greenleaf, 6 N. H. 51; *Skillen v. Richmond*, 48 Barb. 428; *Bull v. Sims*, 23 N. Y. 570. — **ED.**

¹ *Pierson v. Dunlop*, Cowp. 571; *Chiene v. Western Bank*, Court of Session, July 20, 1848; *Kentucky Bank v. Sanders*, 3 A. K. Marsh. 184; *Early v. McCart*, 2 Dana, 414; *Redman v. Adams*, 51 Me. 429; *Kelley v. Mayor*, 4 Hill, 263; *Lowery v. Steward*, 3 Bosw. 505; *Coursin v. Ledlie*, 31 Pa. 506, *accord*. — **ED.**

² *Pearson v. Garrett*, 4 Mod. 242; *Roberts v. Peake*, 1 Burr. 323; *Ex parte Tootell*, 4 Ves. 372; *Hill v. Halford*, 2 B. & P. 413; *Palmer v. Pratt*, 2 Bing. 185; *Ralli v.*

KINGSTON v. LONG.

IN THE KING'S BENCH, MICHAELMAS TERM, 1751.

[Reported in *Bailey, Bills* (6 Ed.), 16.]

THE plaintiff brought an action as indorsee against the defendant, as acceptor, upon an order importing to be payable, — provided the terms mentioned in certain letters written by the drawer were complied with; and the court held, clearly, that the plaintiff could not recover, though the acceptance admitted a compliance with the terms. For the order was no bill until after such compliance; and, if it were not a bill when drawn, it could not afterward become one.

HARTLEY v. WILKINSON AND ANOTHER.

IN THE KING'S BENCH, APRIL 15, 1815.

[Reported in 4 *Maule & Selwyn*, 5.]

ASSUMPSIT by the plaintiff as indorsee against the defendants as makers of a promissory note. Plea: *non assumpsit*.

At the trial, before Lord Ellenborough, C. J., at the Middlesex sittings after last term, the note produced in evidence was thus: —

"We jointly and severally promise to pay Mr. Foster or order the sum of £25; being the amount of the purchase-money for a quantity of fir belonging to Mr. Hartley, and now lying in the parish of Fillingham." Signed by the defendants. Indorsed by J. F.

Also indorsed: "This note is given on condition that, if any dispute shall arise between Mr. Hartley and Lady Wray respecting the fir, the note to be void."

It was proved that this indorsement was upon the note before the defendants subscribed it; and thereupon it was objected that it was

Sarell, D. & R. N. P. 33; Russell v. Wells, 5 Up. Can. o. s. 725; Corbett v. State, 24 Ga. 287; Kellog v. Hemmingway, 13 Ill. 604; Kingsbury v. Wall, 68 Ill. 311; Tucker v. Maxwell, 11 Mass. 143; Grant v. Wood, 12 Gray, 220; Scammon v. Scammon, 28 N. H. 419; Loftus v. Clark, 1 Hilt. 310; Sackett v. Palmer, 25 Barb. 179; Van Wagner v. Terrett, 27 Barb. 181; James v. Hagar, 1 Daly, 517; Weidler v. Kauffman, 14 Oh. 455; Gillespie v. Mather, 10 Barr, 28; Wiggins v. Vaught, Cheves, 91; Shelton v. Bruce, 9 Yerg. 24; Salinas v. Wright, 11 Tex. 572; Downer v. Tucker, 31 Vt. 204, *accord*.

Conf. Goss v. Nelson, 1 Burr. 226. — ED.

not a negotiable note within the Act of Parliament,¹ and that an action could not be maintained upon it, because the money was not absolutely payable; but it depended upon a contingency whether a dispute should exist between Mr. H. and Lady W. or not. His Lordship, being of that opinion, directed a nonsuit.²

Barnewall now moved to set aside the nonsuit, and took this distinction, that here the note was originally for the payment of money the very moment it was made, and did not depend upon any contingency to make it payable. A right of action vested upon it *instantly*. And, therefore, this is not like a note which, by matter *ex post facto*, is to become a note for payment of money, but being a note in the first instance payable, without waiting any contingency, it differs from any other note only in this respect, that the payment might hereafter have been defeated by a contingency, which contingency has not happened.

LORD ELLENBOROUGH, C. J. How can it be said that this note is a negotiable instrument for the payment of money absolutely, when it is apparent that the party taking it must inquire into an extrinsic fact, in order to ascertain if it be payable? By the indorsement, the party takes nothing more than a contingent benefit, dependent upon the happening or not of a particular dispute about the property.

BAYLEY, J. This note cannot be said to be payable, at all events.

DAMPIER, J. The argument is, that a promissory note to pay, "unless a dispute shall arise between A and B," imports an unconditional promise to pay.

*Per Curiam. Rule refused.*³

BRAHAM v. BUBB.

AT NISI PRIUS, CORAM ABBOTT, C. J., JUNE 7, 1826.

[*Reported in Chitty, Bills (10 Ed.), 87, n. 12.*]

A PROMISE to pay "at four years after date, if I am then living, otherwise this bill to be null and void."

ABBOTT, C. J. I think this not like a note payable on the maker's death, which is an event that must happen, but here it is contingent

¹ 3 & 4 An. c. 9.

² See 4 Camp. 127.

³ *Worley v. Harrison*, 3 A. & E. 669; *Campbell v. McKinnon*, 18 Up. Can. Q. B. 612; *Hubbard v. Mosely*, 11 Gray, 170; *Way v. Smith*, 111 Mass. 523; *Fralick v. Norton*, 2 Mich. 130; *Conover v. Stilwell*, 34 N. J. 54; *Seacord v. Burling*, 5 Den. 444; *Coggeshall v. Coggeshall*, 1 Strob. 43, *accord*.

Pool v. McCrary, 1 Ga. 319, *contra*. — ED.

whether the note will ever be payable; for if the maker should die within the four years, no payment is to be made.¹

LOVELL v. HILL.

AT NISI PRIUS, CORAM GURNEY, B., NOV. 28, 1833.

[Reported in 6 Carrington & Payne, 238.]

ASSUMPSIT on the following promissory note, the declaration being in the form prescribed by the rule of court of Trinity term, 1831.

“£130.

BEACHAMPTON, June 24, 1830.

“I promise to pay, or cause to be paid, to John Lovell, on demand, one hundred and thirty pounds, with lawful interest for the same, value received by me.

JOHN HILL.

“Witness, John Billington.”

This note was properly stamped as a promissory note.

J. Jervis, for the defendant. I submit that this paper ought to have borne an agreement stamp. It is not a promissory note, as the party promises in the alternative.

GURNEY, B. Oh, no! That is only his abundant caution.

J. Jervis. The declaration, too, is wrong: it is declared on in the common form as a note, without stating that the defendant promised “to pay, or cause to be paid.”

GURNEY, B. That will do.

*Verdict for the plaintiff.*²

¹ Leeds v. Lancashire, 2 Camp. 205; Williamson v. Bennett, 2 Camp. 417; Hamilton v. Goold, 1 Ir. L. R. 171; Garnock v. Queensberry, Mor. Dict. Decis. 1401; Campbell v. Campbell, 1 Ross, L. C. 16; Eldred v. Mallory, 2 Col. 320; Gillilan v. Myers, 31 Ill. 525; Hays v. Gwin, 19 Ind. 19; Noyes v. Gilman, 65 Me. 589; Coolidge v. Ruggles, 15 Mass. 387; Am. Ex. Bank v. Blanchard, 7 All. 333; Cook v. Satterlee, 6 Cow. 108; Spear v. Downing, 34 Barb. 522, *accord*. — ED.

² Bruce v. Westcott, 3 Barb. 374 (“Six months from date, I guarantee to pay J. K. A., or his order,” &c.), *accord*.

Conf. Brenner v. Weaver, 1 Kans. 488.

Mention may be made here of those cases in which it was decided, strangely enough, that one not a party to a note, who wrote upon it, “I guarantee the payment of the within note,” or words similar, was liable as the maker of a promissory note. But these cases — viz.: Burnham v. Gallentine, 11 Ind. 295; Higgins v. Watson, 1 Mich. 428; Hough v. Gray, 19 Wend. 202; Ketchell v. Burns, 24 Wend. 456; Luquer v. Prosser, 1 Hill, 256; 4 Hill, 420, s. c.; Miller v. Gaston, 2 Hill, 188; Manrow v. Durham, 3 Hill, 584; Amsbaugh v. Gearhart, 11 Pa. 482 — are not to be supported, and have been in the main overruled. See Reeves v. Howe, 16 Cal. 152; Oxford Bank v. Haynes, 8 Pick. 423; Tinker v. McCauley, 3 Mich. 188; Brown v. Curtiss, 2 Comst. 225; Durham v. Manrow, 2 Comst. 533; Brewster v. Silence, 4 Seld. 207, 214; Draper v. Snow, 20 N. Y. 337; Greene v. Dodge, 2 Oh. 498. — ED.

JARVIS *v.* WILKINS.

IN THE EXCHEQUER, JAN. 12, 1841.

[Reported in 7 Meeson & Welsby, 410.]

ASSUMPSIT on a guarantee, with counts for goods sold and delivered, and on an account stated. At the trial before the under-sheriff of Middlesex, the following document was proved by the plaintiff : —

“SEPT. 11, 1839.

“I undertake to pay to Mr. Robert Jarvis the sum of £6 4s., for a suit of, ordered by Daniel Page. S. W. WILKINS.”

It appeared that the goods in question were a suit of clothes, which had been furnished to Page subsequently to the giving of the above undertaking. The plaintiff obtained a verdict for £6 4s., leave being reserved to the defendant to move to enter a nonsuit, in case the court should be of opinion that the instrument was not a guarantee, but a promissory note which required a stamp. A rule was accordingly obtained in Michaelmas term last, against which

C. C. Jones appeared to show cause, but the court called upon

Thomas to support the rule. The instrument in question is a promissory note, and not a guarantee ; but, even if it be a guarantee, it states no consideration on the face of it, and is therefore invalid. It is, however, a promissory note. It is not necessary to state when it is payable ; because, if no period be stated, it is payable on demand. In *Ellis v. Mason*, an instrument in the following form was held to be a promissory note : “John Mason, 14th of February, 1836, borrowed of Mary Ann Mason, his sister, the sum of £14 in cash as per loan, in promise of payment, of which I am truly thankful for.” In *Brooks v. Elkins*, this court said that to constitute a promissory note no particular form of words was requisite. [LORD ABINGER, C. B. This is a memorandum, that, if the plaintiff will sell Page clothes, he, the defendant, will pay for them. If it had been that he would pay for clothes before supplied, it might have been different. It is only a conditional promise. *Thomas* also cited *Wheatley v. Williams*,¹ and contended that if the instrument was not a promissory note, it was void as a guarantee, no consideration being expressed on the face of it.

LORD ABINGER, C. B. I am of opinion that there is nothing in this objection. The cases which have been cited were all of them cases where the consideration was executed, and therefore the written promise to pay the debt amounted to a promissory note ; but in this case it appears, from the instrument itself, that the promise was made

¹ 1 M. & W. 533.

in contemplation of a sale of goods to be afterwards made ; and it is a written undertaking, that if the plaintiff will supply the goods “ordered,” the defendant will pay for them. It is a memorandum of guarantee for the sale of goods, not a promissory note, and requires no stamp.

PARKE, B. I am of the same opinion. If the memorandum contained only a promise to pay £6 4s. for goods already supplied, it would be a promissory note, and would require a stamp ; but the introduction of the word “ordered” makes all the difference, as it shows that it is a promise to pay for goods, if supplied, but which were not then delivered. We are therefore enabled to collect, from the instrument itself, that the consideration for the promise was not an executed consideration, but the future delivery of goods already ordered. No objection has been made that the contract varies from that declared upon ; and the only questions are : first, is this a promissory note ? I think it is not, for the reasons I have already stated ; and secondly, if not a promissory note, is it a binding guarantee ? The rule is now perfectly settled, that the consideration must appear upon the face of the instrument itself, either in express terms or by necessary implication. I think in this case the consideration may be collected by necessary inference, and therefore that the instrument is a binding guarantee.

The other Barons concurred.

*Rule discharged.*¹

SHENTON v. JAMES.

IN THE QUEEN'S BENCH, NOV. 11, 1843.

[Reported in 5 Queen's Bench Reports, 199.]

ASSUMPSIT. The declaration stated that defendant made his promissory note, and delivered the same to plaintiff, and thereby promised to pay plaintiff £50 on demand. Plea : that defendant did not make the said promissory note, in manner and form, &c. Issue thereon.

On the trial before Williams, J., at the last summer assizes at Stafford, the instrument declared upon appeared to be as follows :—

“DEC. 17, 1843.

“On demand, I promise to pay to W. Shenton the sum of £50 in consideration of foregoing and forbearing an action at law in the

¹ Drury v. Macaulay, 16 M. & W. 146 ; Ellis v. Ellis, Gow, 216 ; Hodges v. Hall, 5 Ga. 163 ; Drawn v. Cherry, 14 La. An. 694 ; Fletcher v. Thompson, 55 N. H. 308 ; Considerant v. Brisbane, 14 How. Pr. 487, accord. — ED.

Court of Queen's Bench for damages ascertained by consent to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway in the parish of Seighford.

THOMAS JAMES."

A verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit on the point after stated.

R. V. Richards in this term¹ moved accordingly. This was only an agreement. It was not a promissory note, because the engagement to pay was not absolute: it was an agreement to pay, in consideration of the plaintiff's "foregoing," not of his having foregone, the action. *Clarke v. Percival*² and *Horne v. Redfearn* show that such an instrument is not a note within Stat. 3 & 4 Anne, c. 9, § 1.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered judgment as follows:—

We think it clear that this was a promissory note on an executed and completed consideration, "foregoing and forbearing an action at law," "for damages ascertained by consent" to amount to £50, "by reason of the injury sustained," &c. All here is past; something has been done for which the damages are ascertained; and the note is given in consideration of foregoing an action. *Littledale, J.*, said of the note in *Clarke v. Percival*,² "On the face of it, it is clear that it is not payable at all events." Here the note clearly is so. Three at least of the judges, in that case, appear to have thought that the words did not amount to a promise at all. Here a distinct promise is given.

Rule refused.

RICHARDSON v. MARTYR.

IN THE QUEEN'S BENCH, APRIL 18, 1855.

[Reported in 25 *Law Times*, 64.]

ACTION on a promissory note by the payee against the maker.

The note was for payment by the defendant, on demand, to Mrs.

¹ November 3d. Before Lord Denman, C. J., Williams, Coleridge, and Wightman, JJ.

² 2 B. & Ad. 660.

³ *Burchell v. Slocock*, 2 Ld. Ray. 1545; *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Dixon v. Nuttall*, 6 C. & P. 320; 1 C. M. & R. 307, s. c.; *Wilson v. Smith*, Mor. Dict. Decis. 1402; *Evans v. Bell*, 20 Ala. 509 (*semble*); *U. S. Bank v. United States*, 2 How. 711; *Wells v. Brigham*, 6 Cush. 6; *Beardslee v. Horton*, 3 Mich. 560; *Goshen Co. v. Hurtin*, 9 Johns. 217; *Dutchess Co. v. Davis*, 14 Johns. 238; *Wallace v. Dyson*, 1 Speers, 127.

Conf. Banbury v. Lisset, 2 Stra. 1211. — Ed.

Richardson, or order, of £2,000, for value received. And there was an indorsement on the back, dated Nov. 1, 1851: "In the event of my death, the within-mentioned amount of £2,000 is not to be demanded of the maker; but the same is to remain at interest, and ultimately to be divided among the children of Mrs. Malcolm, my daughter."

Plea: denial of the making of the note.

At the trial before Erle, J., the defendant had the verdict; leave being given to the plaintiff to move to set it aside, and enter it for him.

Mrs. Richardson was the mother-in-law of the defendant, and had advanced moneys to the amount of £1500 to the defendant, — for which I O U's had been given, — and had also become surety for him for £500, and out of this amount had been compelled to pay £350. Pressing for further security from defendant, this note was given, and the indorsement made on it at the time, by Mrs. Richardson's solicitor.

Lush moved, pursuant to leave. The question is, What is the effect of the indorsement? Does it prevent the instrument operating as a promissory note? It is submitted that it does not, and that its effect is not to defeat the instrument as a promissory note, but to provide, in the way of a testamentary disposition, that, if the note remained in Mrs. R.'s hands at the time of her death, then the proceeds were to be distributed among the children. This indorsement is a mere testamentary disposition, and therefore void; but, if not, it is revocable from its very nature.

LORD CAMPBELL, C. J. It is quite clear that the payee could only be entitled to payment of the note on demand during her lifetime. This is, therefore, not an absolute undertaking to pay. If the demand is not made in her lifetime, the defendant ceases to be liable on the note. That makes it conditional; and the instrument, therefore, is not a promissory note.

CROMPTON, J. On the contingency of her death, the note is not payable. The note, therefore, is not payable at all events, and not a promissory note.

Rule refused.

JURY v. BARKER.

IN THE QUEEN'S BENCH, MAY 28, 1858.

[Reported in *Ellis, Blackburn, & Ellis*, 459.]

ACTION by the indorsee of a promissory note against the maker.

Plea, to the first count (on the promissory note): that the supposed

promissory note in that count mentioned was and is in the words and figures following, that is to say :—

“LONDON, 29th Oct. 1857.

“I promise to pay to Mr. J. C. Saunders or his order, at three months after date, the sum of one hundred pounds, as per memorandum of agreement.

HENRY JOHN BARKER.

“Payable at 105 Upper Thames Street, London.”

Demurrer. Joinder.

O'Malley, for the plaintiff. The defendant contends that the words “as per memorandum of agreement” destroy the negotiability of the instrument as a promissory note under Stat. 3 & 4 Anne, c. 9. But that is not so: those words do not limit the absolute promise in writing, signed by the maker, to pay a certain sum to a certain person at a certain time; and that is all that the statute requires. The note here shows the existence of a prior agreement, and earmarks, as it were, the promissory note, so as to prevent the supposition that the payment is to be in respect of any other matter than the sum of money due under that agreement. But the note is still an absolute and unconditional promissory note. [LORD CAMPBELL, C. J. The plea, to be good, should have set out the agreement, and shown that such agreement made the note conditional.]

Raymond, for the defendant. The instrument is not a promissory note within either the law of merchants or Stat. 3 & 4 Anne, c. 9. It is not, upon the face of it, an unconditional promise to pay: the words “as per memorandum of agreement” are, at least, ambiguous, and might refer to some arrangement which would render the note valueless to indorsees. [ERLE, J. The words might mean only “as I agreed to do.”] But they might have another meaning, and one which would render the promise to pay conditional. The note must, on the face of it, be an absolute promise to pay.

LORD CAMPBELL, C. J. The note here is an absolute and unconditional promise, as to the payer, the payee, the amount, and the date. If the addition of the words in question make the promise conditional, it is on the defendant to show that; and he has not done so.

COLERIDGE J., and ERLE, J., concurred.

*Judgment for the plaintiff.*¹

¹ *Byram v. Hunter*, 36 Me. 217; *Littlefield v. Hodge*, 6 Mich. 326, *accord*.

Conf. *Jenkins v. Caddo*, 7 La. An. 559, where the following instrument was held not to be a note: “On demand, please pay to the order of W. J. the sum of \$7,000, according to a donation made by the Shreveport Town Company to the parish, the same to be in accordance with a resolution of the police jury, passed Oct. 6, 1840.”

—ED.

SECTION IV.

They must be for the Payment of Money.

MORRIS v. LEE.

IN THE KING'S BENCH, TRINITY TERM, 1725.

[Reported in 1 Strange, 629.]

THE plaintiff declares that the defendant made a promissory note under his hand, whereby he promised to be accountable to the plaintiff or order for £100, value received, and counts upon the statute.

After verdict for the plaintiff, it was moved in arrest of judgment that this was not within the statute, and that the distinction had always held between negotiable and accountable notes; that no note was negotiable that was not for the payment of money absolutely, according to the cases of *Appleby v. Biddle* and *Smith v. Boheme*, whereas the defendant in this case might discharge himself by payment of the plaintiff's debts or otherwise.

Sed per Curiam. There are no precise words requisite to make a promissory note: it is enough if it may be brought within the intention of the act. This is for value received, and he makes himself accountable to the order. A fourth or fifth indorsee can settle no account with him: therefore we must take the word "accountable" as much as if it had been "pay," and the plaintiff must have judgment.

*Quære tamen.*¹

REX v. WILCOX.

CROWN CASES RESERVED, EASTER, 1808.

[Reported in *Bayley, Bills* (6 Ed.), 11.]

INDICTMENT for forging and uttering a promissory note: the note was to "pay the bearer on demand one guinea in cash or Bank of England notes." A case was reserved for the consideration of the twelve judges, on the question, whether this was a note within the statute. A majority of them held it was not; and, upon a representation to the crown, the prisoner was pardoned.²

¹ *Barker v. Seaman*, 61 N. Y. 648, accord. — ED.

² *Ex parte Imeson*, 2 Rose, 225 (Bank of England notes); *Ex parte Davison*, Buck, 31 (Bank of England notes); *Irvine v. Lowry*, 14 Pet. 293 (bank-notes);

HORNE, EXECUTOR OF WILLIAM DENT, DECEASED, v. REDFEARN.

IN THE COMMON PLEAS, MAY 4, 1838.

[Reported in 4 New Cases, 433.]

IN this action for money lent by the deceased in his lifetime to the defendant, the question, upon a special case, was, whether the following letter or writing directed and sent to the deceased on the 28th of December, 1829, by the defendant, was admissible in evidence, under an agreement stamp:—

“SIR,—I have received the sum of £20, which I have borrowed of you, and I have to be accountable for the said sum, with legal interest. I am, &c.

PETER REDFEARN.”

The writing was sent or delivered by the defendant to Dent at the time it bears date. It was not stamped till some years afterwards, when it was stamped with a £1 stamp, on payment of the penalty of £5.

The defendant contended that the document was a promissory note; that it ought to have been stamped as such at the time it was written; and that the commissioners of stamps had no power to stamp it afterwards.

Hasbrook v. Palmer, 2 McL. 10 (New York funds); Fry v. Rousseau, 3 McL. 106 (bank-notes); Hawkins v. Watkins, 5 Ark. 481 (Arkansas money of Fayetteville Branch); Jones v. Fales, 4 Mass. 245 (foreign bills); Young v. Adams, 6 Mass. 182, 188 (foreign bills, *semble*); Leiber v. Goodrich, 5 Cow. 186 (Pennsylvania bank-bills); State v. Corpening, 10 Ired. 58 (bank-notes); Shamokin Bank v. Street, 16 Oh. St. 1 (Shamokin bank-notes); McCormick v. Trotter, 10 S. & R. 94 (notes of chartered banks of Pennsylvania); Lange v. Kohne, 1 McC. 115 (paper medium); Hamburg Bank v. Johnson, 3 Rich. 42 (sight check); Deberry v. Darnell, 5 Yerg. 451 (North Carolina bank-notes), *accord*.

Besancon v. Shirley, 17 Miss. 457 (Mississippi bank-notes), statutory; Keith v. Jones, 9 Johns. 120 (York State bills or specie); Childress v. Stuart, Peck, 276 (bank notes), overruled, *contra*.

It will be noticed that the decision in the principal case was prior to the statutes 3 & 4 Will. IV. c. 98, § 6, and 7 & 8 Vict. c. 32, § 27, by virtue of which Bank of England notes are now a legal tender. In Gray v. Worden, 29 Up. Can. Q. B. 535, it was decided that an instrument payable in “Canada bills” was not a promissory note, although by 29 & 30 Vict. c. 10, such bills were made a legal tender. Wilson, J., who delivered the opinion of the court, observes, p. 540: “It may be that a person can make a promissory note payable in a particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in Canada bills, because they are not money or specie. They have no intrinsic value as coin has. They represent only, and are the signs of, value. ‘Money itself is a commodity: it is not a sign; it is the thing signified.’ McCulloch’s Principles of Pol. Ec. 135.” — ED.

Knowles, for the plaintiff. This is not a promissory note, but a mere acknowledgment of the receipt of money, which does not require a stamp. *Fisher v. Leslie*, *Israel v. Israel*.¹ In *Morris v. Lee*, which may be cited on the other side, the defendant promised to be accountable to A. or order, for £100 value received; and the instrument was held to be a promissory note; but it contained the word "promise," and was payable to order, neither of which ingredients exists in the present case. For aught that appears, this instrument may have been given for the purpose of taking the debt out of the Statute of Limitations, and, if so, it would be exempted from stamp duty, under 9 Geo. IV. c. 14, § 8.

W. H. Watson, for the defendant. The word "promise," and its being made payable to order, are not essential to a promissory note. An agreement to be accountable is a promise to pay, and would be so stated in pleading. No particular form of words is necessary to constitute a promissory note, per Bayley, J., in *Green v. Davies*;² and therefore in *Brookes v. Elkins* an instrument in the following form, — "11th of October, 1831. IO U £20, to be paid on the 22d instant. W.B." — was held to require a stamp, either as a promissory note or as an agreement for the payment of money above the value of £10; and in *Wheatley v. Williams* ³ the following letter, — "I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to £80, which sum I will pay in two years" — was held to be a promissory note. *Morris v. Lee* is in point. At all events, this instrument imports that interest is to be paid; and the schedule to 55 Geo. III. c. 184, under the head promissory note, directs that "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement, or memorandum importing that interest shall be paid for the money so deposited, shall be deemed and taken to be promissory notes."

TINDAL, C. J. This case may be determined upon the words of the stamp act, without referring to any of the decisions which have been cited. The instrument in question is not a promissory note in its terms; but, in order to prevent fraud, certain instruments described in the act are to be deemed and taken to be promissory notes, and, among them, "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited." That is the only class in which this writing could be placed, if in any; but, as it does not appear to be a receipt for money deposited in any bank, the description does not apply. Then follow the

¹ 1 Camp. 499.

² 4 B. & C. 239.

³ 1 Mees. & Wels. 533.

exemptions, — “all other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.” And as this does not fall within the description of what shall be deemed to be promissory notes, so it may fairly be deemed in law a special agreement. The defendant says, “I have received the sum of £20, which I have borrowed of you, and I have to be accountable for the said sum;” that may be by way of set-off upon mercantile transactions or otherwise. It would be a hard construction of the act to hold this a promissory note, when the defendant has paid £1, which is a larger stamp than a note would have required.

PARK, J., concurred.

BOSANQUET, J. I consider this an agreement and not a promissory note. The fair and reasonable interpretation of the words, “I have to be accountable,” is that the party will give credit in account and pay the balance. That is a special agreement, and not a promissory note: if so, it falls within the exemption of the statute; and nothing is lost to the revenue, because as an agreement it is subject to the higher stamp.

COLTMAN, J. The description of a receipt given for money deposited at a banker's does not apply to this instrument; but it appears to be an agreement within the meaning of the exemption, and, as such, not liable to a promissory note stamp.

*Judgment for the plaintiff.*¹

ELLISON v. COLLINGRIDGE.

IN THE COMMON PLEAS, APRIL 15, 1850.

[Reported in 9 Common Bench Reports, 570.]

ASSUMPSIT. The first count was upon a policy of assurance made by the Port of London Sea, Fire, and Life Assurance Company. The second count charged the defendant as the drawer of a bill of exchange for £500, indorsed to the plaintiff. The third count described the same instrument as a promissory note. The fourth count was upon an account stated.

The defendant pleaded *non assumpsit* to the first and last counts, traversed the drawing and making respectively of the bill and note in

¹ *White v. North*, 3 Ex. 689; *Carey v. Eccleston*, 1 Cr. & D. Abr. Cas. 6; *Pirie v. Smith*, Court of Session, Feb. 28, 1833; 1 Ross, L. C. 56, s. c., *accord*.

Conf. *Clarke v. Percival*, 2 B. & Ad. 660. — ED.

the second and third counts, and further pleaded a plea of fraud to the whole declaration.

The cause was tried before Wilde, C. J., at the sittings in Middlesex after the last term. The plaintiff put in an instrument as follows:—

“MARINE DEPARTMENT,

“PORT OF LONDON SEA, FIRE, AND LIFE ASSURANCE COMPANY.

“To the cashier.

31 CORNHILL, Sept. 10, 1849.

“£500.

“Fifty-three days after date, credit Messrs. Plummer & Co., or order, with the sum of five hundred pounds, claimed per ‘Cleopatra,’ in cash, on account of this corporation.

“AUGUSTUS COLLINGRIDGE, *Managing Director*.”

A verdict was entered for the plaintiff on the second count for £500, subject to leave reserved to the defendant to enter a verdict for him, if the court should be of opinion that the instrument in question was not a bill.

Byles, Serjt., now moved accordingly. This is not an order to pay a sum of money. It is no more than a direction by the manager of the corporation to the cashier to open a cash credit to the extent of £500 with the persons mentioned in the document. [WILDE, C. J. What is the effect of that? Does it not mean, “pay them that amount”?] That would depend upon the other side of the account. [WILDE, C. J. This was the only transaction between the parties.] Supposing it does amount to an order to pay, how much is to be paid? That must depend upon whether or not the payees were debtors to the company at the maturity of the bill. If they were debtors, it would amount to an order to pay them the balance. [CRESSWELL, J. We cannot take into consideration any counter claim in construing this instrument.] This is, in truth, a mere order or direction from a principal to an agent. In *Russell v. Powell*,¹ J. M., by indenture, assigned to the plaintiff a ninth part of his share in the residue of the estate of T. H., deceased. By an order of the 29th of July, 1842, made in a suit in chancery, of *Powell v. Norwood*, the Vice-Chancellor ordered the defendants in that suit to retain £250, being a part of the produce of J. M.’s share of the residuary estate of T. H., to be paid to such person as the now defendant and J. M. should jointly direct. It was afterwards agreed between the parties that £50, to be considered as part of the sum of £250, should be paid by the defendant to the solicitors for J. M. and the plaintiff. An action having been brought to recover this sum of £50, the plaintiff tendered in evidence the following document: “To the executors of T. H. deceased.

¹ 14 M. & W. 418.

Powell v. Norwood : Gentlemen,— We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of £250, being the amount directed by the order of the 29th of July last to be paid to our order. We are, &c. J. M. Dec. 16, 1842.” This document was signed by J. M. only, and was unstamped. It was held (ROLFE, B., *dissentiente*) that it was not a bill of exchange, and that it was admissible in evidence without a stamp. [CRESSWELL, J. Who ever heard of a negotiable right to be credited in a book? WILDE, C. J. Suppose this instrument had been accepted by the cashier, what would have been the consequence?] He would not have been liable to be called upon to pay it. This is not unlike the case of *Jenney v. Herle*, where it was held that a bill drawn payable out of a particular fund is not a bill of exchange. At the utmost, this is an order to pay out of the moneys of the corporation.

WILDE, C. J. I think this instrument is a bill of exchange. There is nothing ambiguous in its terms ; nothing to be inferred but that the sum therein mentioned is to be paid. As I understand the words “credit in cash,” this is an order by one person on another, to hold to the use, or at the command, of a third party, a certain sum. That means “pay the money to him.” I see no ground for a rule.

CRESSWELL, J. “Credit in cash” clearly means “pay over the money.” The case of *Russell v. Powell* differs essentially from this. There, a very special agreement was entered into ; but the judgment of Rolfe, B., shows pretty strong reasons for construing the instrument to be a bill of exchange.

WILLIAMS, J. I am of the same opinion. “Credit in cash” is equivalent to “pay.”

TALFOURD, J., concurred.

*Rule refused.*¹

¹ *Allen v. Sea Ins. Co.*, 9 C. B. 574, *accord.*

Woolley v. Sergeant, 3 Halst. 262, *contra.*

See *Reg. v. Gilchrist*, Car. & M. 224. — *Ed.*

THE ST. STEPHEN BRANCH RAILWAY COMPANY v.
BLACK.

IN THE SUPREME COURT, NEW BRUNSWICK, JUNE 21, 1870.

[Reported in 2 Hannay, 139.]

THIS was an action on the following promissory note :—

“\$371.00.

ST. STEPHEN, Aug. 27, 1867.

“One year from date, for value received, I promise to pay to my own order, at the St. Stephen's Bank, three hundred and seventy-one dollars, with interest, payable in U. S. currency.

“WM. F. BLACK.”

The note was indorsed by the defendant.¹

At the trial before Allen, J., it was proved that the term “U. S. currency” meant the currency of the United States of America. At the time of the trial, \$100 in gold was worth \$133½ of this currency.

A verdict was taken for the plaintiff for \$279 (the amount in the currency of this province which would produce the amount of the note and interest in United States currency), with leave to move for a nonsuit, on the ground that the writing was not a promissory note, not being for a sum certain.

Needham having obtained in Michaelmas term last a rule *nisi*,

Grimmer showed cause in Hilary term. The contention of the defendant that this is not a promissory note because it is to be paid in United States currency, which fluctuates in value here, and is therefore not for a sum certain, cannot be sustained. If a note is payable in money, it is immaterial in the currency of what country it is payable. Story on Promissory Notes, 317. That rule applies to this case.

Needham, contra. The fact of this document being payable in United States currency, which in this province fluctuates in value, prevents the plaintiff from recovering; for it is not for a sum certain, and is therefore not a promissory note. The plaintiff has declared upon it as a promissory note, which it is not, and the common counts cannot help him.

ALLEN, J., now delivered the judgment of the majority of the court.²

It is said in Chitty on Bills, 133, that it is not necessary that the money payable by a note should be that current in the place of pay-

¹ See *supra*, p. 19, note 4. — ED.² Ritchie, C. J., Allen and Weldon, JJ.

ment or where the bill is drawn : it may be in the money of any country whatever. And in Story on Promissory Notes, § 17, it is said that, "provided the note be for the payment of money, it is wholly immaterial in the money or currency of what country it is made payable." Is not this note for the payment of money only ? And may it not be assumed that "United States currency" means the money of the United States, and that the note is for the payment of three hundred and seventy-one dollars of the United States. The Act 58 Geo. III. c. 23, mentions the dollars of the United States, and makes them current in this province. The Act 15 Vict. c. 85, uses the term "currency," and declares it to mean the current money of this province ; and the Act 23 Vict. c. 48, § 3, declares that the eagle of the United States coined after the 1st July, 1834, and of a certain weight, shall pass and be a legal tender for ten dollars, and the multiples and divisions thereof in the same proportion. This is a legislative recognition that the eagle of the United States and the divisions thereof are the coins, or, in other words, the currency of that country. In Wharton's Law Dictionary, currency is defined to be bank-notes or other passing money issued by authority, and which are continually passing as and for coin.

FISHER, J. I have some doubts whether the note, the subject of this action, from its terms, is a promissory note ; and the different acts of assembly relating to legal tender and currency have rather increased them, as they speak of the eagle of the United States, of a dollar, and of currency, but refer to the dollar as consisting of one hundred cents ; and the eagle is made a legal tender for ten dollars of one hundred cents. Now, the note in question for \$371 was found to be equal to \$279 ; or, in other words, the \$371 United States currency referred to in the note would only produce \$279, if paid in the gold eagles of the United States or the multiples or divisions thereof. There appears to me to be a want of certainty, which I think essential to a promissory note. In order to get at the amount of the note in New Brunswick currency, it was necessary to prove the value of the greenback paper notes in circulation, which was said to be constantly varying.

*Per Curiam. Rule discharged.*¹

¹ Sanger v. Stimpson, 8 Mass. 260 ; Black v. Ward, 27 Mich. 191, 194 (*semble*), *accord*.

But see Thompson v. Sloan, 23 Wend. 71 ; *infra*, p. 51, note 2, s. c., *contra*.—ED.

JUDAH v. HARRIS.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1821.

[Reported in 19 Johnson, 144.]

THIS was an action of assumpsit, on a promissory note, tried at the Chenango Circuit, in June, 1820, before Mr. Chief Justice Spencer. The declaration was against the defendant, as the third indorser of a note made by P. Randall, dated Norwich, March 13, 1818, for \$415.22, payable "at the Branch Bank of the Manhattan Company, in the village of Utica, in the bank notes current in the city of New York, for value received."

At the trial, the note was proved and read, and evidence was given as to the notice to the defendant of the non-payment, which it is unnecessary to state. The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case made.

Collier, for the plaintiff. He cited *Keith v. Jones*; ¹ 1 Burr. Rep. 459; 1 Johns. Cases, 231; 4 Mass. Rep. 245; *Chitty on Bills*, 340; 12 Johns. Rep. 226, 395. —

Foot, contra.

WOODWORTH, J., delivered the opinion of the court. The note in question was payable "in bank-notes current in the city of New York." On the argument, it was contended that this was not a negotiable promissory note, within the statute. In *Keith v. Jones*,² it was held that a note payable in York State bills or specie was the same thing as being made payable in lawful current money of the State; for the bills mentioned mean bank paper, which is here, in conformity with common usage, regarded as cash. Lord Mansfield, in *Miller v. Reid*, observed "that these notes are not, like bills of exchange, mere securities or documents for debts, nor are so esteemed, but are treated as money, in the ordinary course and transactions of business, by the general consent of mankind; and on payment of them, when a receipt is required, the receipts are always given as for money, not as for securities or notes."

In *Handy v. Dobbin*,⁴ it was decided that bank-bills could be levied on by execution, and that they are treated, *civiliter*, as money. In the case cited, it did not appear what description of bills had been attached; but there can be no doubt that all current bank paper was intended by the court. The same general expressions are used in

¹ 9 Johns. Rep. 120.

³ 1 Burr. 457.

² *Ibid.*

⁴ 12 Johns. Rep. 220.

Holmes *v.* Nuncaster¹ and in Mann *v.* The Executors of Mann.² The present chancellor says "that the word money may be extended to bank-notes, when they are known and approved of, and used in the market as cash."

But it is urged by the defendant's counsel that bills of New Jersey might be tendered to satisfy this note, and that they cannot be considered as money, unless their circulation be coextensive with the State.

The principle laid down in Jones *v.* Fales³ is applicable to this case: "The court must take notice, in common with the people, that bank-notes derive their value, not only from the certainty, but the facility of payment; consequently, that a man in trade in Boston, holding a bill issued by a bank at a distance from Boston, can less easily obtain payment than he could if the issuing bank was near to him; and that a different facility of procuring payment may create a difference in their value." It was therefore held that the import of the words "foreign bills" was not cash, but something differing in value from cash. So, in the present case, the court will take notice that notes current in the city of New York are of cash value throughout the State, and are distinguished by those words from other bank-notes which are received at a discount, and hence it is immaterial whether the notes of banks in other States might be tendered in payment, provided they were current in the city of New York; in that case, they are considered cash equally with the current bills of this State. From authority, I cannot perceive any objection to the note in question. It would have been a note under the statute, if payable in bank-notes generally; consequently, it is valid as such, when confined to a species of bank paper of known cash value. At the trial, testimony was introduced for the purpose of showing that due diligence had not been used to charge the indorser, but it was not made a point on the argument. On looking into the case, there appears to be no ground for making that a question: we are, therefore, of opinion that the plaintiff is entitled to judgment.

*Judgment for the plaintiff.*⁴

¹ 12 Johns. Rep. 396.

² 1 Johns. Ch. Rep. 231.

³ 4 Mass. Rep. 245.

⁴ Lacy *v.* Hollbrook, 4 Ala. 88 (funds current in New York city); Carter *v.* Penn, 4 Ala. 140 (current money of Alabama); Swift *v.* Whitney, 20 Ill. 114 (currency); Phoenix Ins. Co. *v.* Allen, 11 Mich. 501; 13 Mich. 191, s. c. (current funds), *semble*; Phelps *v.* Town, 14 Mich. 374 (currency), *semble*; Mitchell *v.* Hewitt, 13 Miss. 361 (currency of State of Mississippi), *semble*; Pardee *v.* Fish, 60 N. Y. 265 (current bank-notes); Morris *v.* Edwards, 1 Oh. 80 (current bank-notes of Cincinnati); Dugan *v.* Campbell, 1 Oh. 47 (currency of this place); Swetland *v.* Creigh, 15

ROBERT SEARCY v. A. AND R. VANCE.

IN THE SUPREME COURT, TENNESSEE, MARCH, 1827.

[Reported in *Martin & Yerger*, 225.]

THIS was an action of debt, upon an obligation in these words:
 "JUNE 2d, 1824.

"On or before the first of January next, I promise to pay William Pike one hundred dollars in Tennessee money."

The defendant demurred generally to the declaration, which was sustained by the Circuit Court. The cause was argued upon the ground that an action of debt would not lie upon an instrument of this kind.

Per Curiam. A note payable in Tennessee money is, to all legal intents, a note payable in gold or silver; for nothing but gold or silver constitutes Tennessee money. The case is different, where it is payable in Tennessee bank-notes; as in *Gamble v. Hatton*,¹ to which case this has no analogy.

*Judgment affirmed.*²

Oh. 118. (current Ohio bank-notes); *White v. Richmond*, 16 Oh. 5 (current funds of Ohio); *Howe v. Hartness*, 11 Oh. St. 449 (currency); *Fleming v. Nall*, 1 Tex. 246 (current bank-notes), *accord*.

Mobile Bank v. Brown, 42 Ala. 108 (currency); *Dillard v. Evans*, 4 Ark. 175 (common currency); *Lafayette Bank v. Ringel*, 51 Ind. 393 (current funds); *Rindskoff v. Barrett*, 11 Iowa, 172 (currency); *Huse v. Hamblin*, 29 Iowa, 501 (currency); *Campbell v. Weister*, 1 Litt. 30 (current bank paper); *Chambers v. George*, 5 Litt. 335 (currency of Kentucky); *Breckenridge v. Rails*, 4 Monr. 533 (notes receivable in bank); *Farwell v. Kennett*, 7 Mo. 595 (currency); *Cockrill v. Kirkpatrick*, 9 Mo. 688, *semble* (currency of Missouri); *Little v. Phenix Bank*, 2 Hill, 425; 7 Hill, 359, s. c. (current bank-notes of Mississippi); *Warren v. Brown*, 64 N. Ca. 381 (current notes of North Carolina); *Johnson v. Henderson*, 76 N. Ca. 227 (current funds); *Gray v. Donahoe*, 4 Watts, 400 (current bank-notes); *Wright v. Hart*, 44 Pa. 454 (current funds at Pittsburgh); *Gamble v. Hatton*, Peck, 130 (current bank-notes); *Hicklin v. Tucker*, 2 Yerg. 448 (Tennessee currency); *Kirkpatrick v. McCullough*, 3 Humph. 171 (current bank-notes); *Whiteman v. Childress*, 6 Humph. 303 (current bank-notes); *Simpson v. Moulden*, 3 Coldw. 429 (current bank-notes); *McDonnell v. Keller*, 4 Coldw. 258 (current bank-notes); *Collins v. Lincoln*, 11 Vt. 268 (current bills); *Ford v. Mitchell*, 15 Wis. 304 (currency); *Platt v. Sauk Co. Bank*, 17 Wis. 222 (current funds); *Lindsey v. McClelland*, 18 Wis. 481 (current funds); *Bettis v. Weller*, 30 Up. Can. Q. B. 23 (current funds of the United States), *contra*.

See *Blood v. Northup*, 1 Kans. 28 (current funds). — Ed.

¹ Peck's Rep. 130.

² *Graham v. Adams*, 5 Ark. 261 (good current money of the State); *Wilburn v. Greer*, 6 Ark. 255 (Arkansas money); *Burton v. Brooks*, 25 Ark. 215 (greenback currency); *Lampton v. Haggard*, 3 Monr. 149 (Kentucky currency); *McChord v. Ford*, 3 Monr. 166 (current money of Kentucky); *Black v. Ward*, 27 Mich. 191 (Canada currency); *Butler v. Paine*, 8 Minn. 324 (currency); *Cockrill v. Kirkpatrick*, 9 Mo. 688 (*semble*), (current money of Missouri); *Frank v. Wessels*, 64 N. Y. 155 (paper currency); *Gift v. Hall*, 1 Humph. 480 (Brandon money); *Ogden v. Slade*, 1 Tex. 13 (lawful funds of United States), *accord*. — Ed.

JOHN P. CHRYSLER, RESPONDENT, v. PETER J. RENOIS
AND HENRY G. GRISWOLD, APPELLANTS.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1870.

[Reported in 43 New York Reports, 209.]

APPEAL from the decision of the general term of the Supreme Court in the fourth judicial district, affirming the judgment entered upon the report of a referee in favor of the plaintiff.

On Sept. 11, 1866, the defendants, who resided at Whitehall in the State of New York, contracted with William Pillar, at Montreal, Canada, for the purchase of certain lumber to be delivered at Dickinson's Landing in Canada.

On the 13th of September, Pillar professing to the defendant Renois that he feared that on the delivery of the lumber they would not take it, the latter gave him his draft on the defendants for 1,205 gold dollars, payable at the Park National Bank, in the city of New York, Pillar at the same time giving a receipt therefor, containing an agreement that it should not be negotiated until the contract was fulfilled.

Pillar soon after transferred the draft to the plaintiff, in part payment of notes which he held against Pillar, which were then past due, and were secured by a mortgage given as collateral thereto. On the receipt of the draft, the notes were all surrendered to Pillar, and new notes were given for the balance remaining unpaid.

Pillar failed to deliver all the lumber, and the defendants refused to pay the draft, on the ground that it was not negotiable.¹

H. Gibson, with *J. Gibson* of counsel, insisted that instrument was not a bill of exchange. 5 Cow. 186; 23 W. 734; 7 Hill, 359; 7 Wall. 258; 13 Peters, 778; 17 J. R. 511; 1 P. 220; 47 B. 29.

Brown & Hasbrouck, for respondents.

ALLEN, J. The bill in suit was drawn in Montreal on a business firm at Whitehall in this State, payable in New York, in dollars, the money of account of the State, and in gold dollars, a coin authorized by congress, and made a legal tender in payment of debt. It was therefore negotiable as a bill of exchange. 1 R. S. 611, § 1; 9 U. S. Stat. at Large, 397.

It is enough that it is for the payment of money, and money only, in cash and not something that may differ in value from cash. *Leiber v. Goodrich*.² It is agreed that bills payable in merchandise, or any thing but money, are not good bills of exchange, but the

¹ See *supra*, p. 19, note 4. — ED.

² 5 Cow. 186.

cases are not agreed in all respects as to what shall be deemed money. In this State, it is held that a promissory note, payable "in bank-notes current in the city of New York," or in "New York State bills or specie," are negotiable notes within the statutes, *Keith v. Jones*,¹ *Judah v. Harris*; while a note payable, "in Canada money" is not a negotiable note.² The first cases were decided upon the ground that the court might take judicial notice that bank-notes current in the city of New York were customarily considered and treated as equivalent to money, which could not be predicated of a note payable in Canada money. Coin current in Canada might not be current in this State, and foreign bills are not regarded as money. *Jones v. Fales*.³ In other States, a different rule prevails; and bills payable in bank-bills, even of the State where payable, are held not negotiable. *McCormick v. Trotter*.⁴ In this action, the bill is for 1,205 gold dollars, that is \$1,205 in gold coin, and as is claimed in coin of a particular denomination; but it is nevertheless payable in a coin known and recognized as a part of the currency of the country, coined by authority of congress and made receivable in all payments. 9 Stat. at Large, 397. If the bill had called for \$1,205, without specifying the coin or currency, it would have been payable in any lawful currency, and the acceptors might have discharged their obligations by tendering payment in "gold dollars." The tender would have been in money; but, if "gold dollars" are but an article of merchandise, a commercial commodity, as claimed, a tender of these in satisfaction of an obligation

¹ 9 J. R. 120.

² *Thompson v. Sloan*, 23 Wend. 71. "By the Court, Cowen, J. A promissory note must, in order to come within the statute, like a bill of exchange, be payable in money only, in current specie. . . . Admitting that the note in question imports an obligation to pay in gold and silver, current in Canada, I do not see on what principle we can pronounce it to be payable in money, within the meaning of the rule. It is not pretended that coins current in Canada are therefore so in this State. As gold and silver, they might readily be received; and so might be the coin of any foreign country, — Germany or Russia, for instance; but the creditor might, and in many cases doubtless would, refuse to receive them, because ignorant of their value. In law, they are all collateral commodities, like ingots or diamonds, which, though they might be received, and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would therefore be no more negotiable than if it were payable in cattle or other specific articles. . . . This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery." (a) — Pages 73-75. — Ed.

³ 4 Mass. 245.

⁴ 10 Serg. & R. 94.

(a) See *Cary v. Courtenay*, 103 Mass. 316. — Ed.

for the payment of money would not be good, and a debtor could not by such tender relieve himself from his obligation. The laws have not been repealed which declare the money value of the gold and silver coin of the United States and make them a legal tender in the payment of debts. The bill has all the qualities of a negotiable bill of exchange; it is payable absolutely, and in money, and not out of a particular fund.

There are two descriptions of lawful money in use under acts of congress (assuming the validity of the Legal Tender Acts, so called, as applicable to any contract calling for money), and it does not destroy the negotiability of commercial paper or change its character that it is in terms made payable in any description of money that is recognized and known as money current in business, and which is made a legal tender in payment of debts. *Butler v. Horwitz*,¹ *Bronson v. Rodes*.² Bills of exchange are favored as valuable instruments in commerce, and merchants must be permitted to make them payable in any money lawful and current in the place where payable; and, if more than one description of money is recognized by the law of the place, to select that which is most convenient to the parties, without changing the character and legal incidents of the instruments and destroying their negotiability.

But the referee has found, as a question of fact, that the contents of the said bill of exchange, or draft, were expressed in the money of account and currency of the province of Canada, and has awarded damages for non-payment upon that theory; that is, has given judgment for the value of the amount called for in Canada coin in Montreal on the day the bill matured. In this the referee erred. The contract, interpreted by the law of the place where payable, called for payment in money there current, and the construction of the contract was one of law and not of fact.

The error of the referee was carried into the judgment in the assessment of the damages.

The judgment must be modified, and reduced to the amount to which the plaintiff was entitled, payable in coin, with costs of the court below, payable in currency, without costs to either party upon the appeal.

All the judges concurring, judgment modified in accordance with the opinion of Allen, J.³

¹ 7 Wall. 258.

² 7 Wall. 229.

³ See *Trebilcock v. Wilson*, 12 Wall. 687; *Churchman v. Martin* (Indiana, February, 1877), 4 C. L. J. 343; *Phillips v. Dugan*, 21 Oh. St. 466; *Smith v. McKinney*, 22 Oh. St. 200. — ED.

SECTION V.

The Order or Promise to pay Money must not be coupled with an independent order or promise to do something else.

MARTIN v. CHAUNTRY.

IN THE KING'S BENCH, TRINITY TERM, 1748.

[Reported in 2 *Strange*, 1271.]

THE court held, on error from C. B., that a note to deliver up horses and a wharf, and pay money at a particular day, could not be counted on as a note within the statute, and therefore reversed the judgment.¹

WISE v. CHARLTON.

IN THE KING'S BENCH, APRIL 18, 1836.

[Reported in 4 *Adolphus and Ellis*, 786.]

ASSUMPSIT by the indorsee of a promissory note against the maker. The declaration (which was filed before the operation of the rules Hil. 4 W. 4) described the note as made 16th of April, 1823, in favor of John Goodwin Johnson, or order, payable on demand, with lawful interest, for value received, and indorsed by Johnson to the plaintiff; and it averred a demand on 2d of September, 1833. Plea: *non assumpsit*. On the trial before Lord Abinger, C. B., at the last Derby assizes, the note was produced; and it was in the following form:—

“£120.

APRIL 16, 1823.

“On demand, I promise to pay to Mr. John Goodwin Johnson, or order, the sum of one hundred and twenty pounds, with lawful interest for the same for value received; and I have deposited in his hands

¹ “The case of *Martin v. Chauntry* shows that a promise in writing to pay money, and do any other thing, is not a promissory note. To constitute a promissory note, the promise must be to pay a sum certain and nothing else.” Per Parke, B., in *Follett v. Moore*, 4 Ex. 416. And see to same effect: *Moor v. Van Lute*, Bull. N. P. 272; *Davies v. Wilkinson*, 10 A. & E. 98; *Boyd v. Rumsey*, 5 J. J. Marsh. 42; *Bunker v. Athearn*, 35 Me. 364; *Cook v. Satterlee*, 6 Cow. 108; *Knight v. Wilm. R.R. Co.*, 1 Jones (N. Ca.), 357; *Wallace v. Dyson*, 1 Speers, 127; *Barnes v. Gorman*, 9 Rich. 297, *accord*.

Winston v. Metcalf, 7 Ala. 837; *Gaines v. Shelton*, 47 Ala. 413, *contr* 1. *Conf. Baxter v. Stewart*, 4 Sneed, 213. — ED.

title-deeds to lands purchased from the devisees of William Toplis, as a collateral security for the same. W. CHARLTON."

To this note there was a proper promissory note stamp at the time it was signed by the defendant, and a stamp of £2 (the proper stamp for a legal or equitable mortgage of the amount of the note) had been imposed on payment of a penalty, subsequently to the commencement of the action. It appeared that the payee Johnson, and the plaintiff Wise, were partners as attorneys; that the note had been prepared by Wise, and the deeds mentioned in it left with him; but that, several years before the indorsement of the note to Wise, he, Wise, had delivered back the deeds to the defendant. It was objected, on the part of the defendant, that the latter stamp was unavailable, as having been made by the commissioners without authority; that, even supposing the commissioners had authority to stamp a promissory note after it was made, yet an assignment stamp was also requisite to enable an assignee to sue upon this instrument, and that it was an agreement and equitable mortgage, and not a promissory note assignable under Stat. 3 & 4 Anne, c. 9, § 1. The Lord Chief Baron received the note in evidence, but reserved leave to move to enter a nonsuit. The case went to the jury on some disputed facts respecting the consideration, and the plaintiff had a verdict.

Whitehurst now moved for a rule to show cause why a nonsuit should not be entered, or a new trial had for misdirection. First, the commissioners had no authority to affix the £2 mortgage stamp after the note was made, if the instrument is to be considered a promissory note. By Stat. 23 Geo. III. c. 49, § 14, and Stat. 31 Geo. III. c. 25, § 19, the paper upon which promissory notes are drawn must be stamped before the note is made. And by the latter statute the commissioners are expressly prohibited from stamping any paper, &c., upon which a promissory note shall be written; and a note not duly stamped is not available in law or equity. Stat. 37 Geo. III. c. 136, § 1, enables the commissioners to stamp certain instruments after they are executed, upon the payment of a penalty; but that statute expressly excepts the paper upon which promissory notes may be written. The commissioners, therefore, had no authority to affix any stamp upon this paper upon which a promissory note had before been written. And § 5 of the act does not apply to a note which, when made, had not any stamp of the proper amount. *Green v. Davies*,¹ *Butts v. Swan*.² The regulations of former statutes on this subject are made applicable to the present stamp act, 55 Geo. III. c. 184, by § 8 of that act. But, secondly, assuming that the commissioners had authority to affix the £2

¹ 4 B. & C. 235.

² 2 B. & B. 78.

mortgage stamp after the note was made, and that that stamp would have been sufficient (Stat. 55 Geo. III. c. 184, sched. part 1, Mortgage) if the payee of the note himself had sued upon the note, yet, as the security has been assigned over, an additional stamp of £1 15s. was necessary (Stat. 3 Geo. IV. c. 117, § 2); for the assignment of the note is an assignment of the equitable mortgage contained in the note. Thirdly, this was not an assignable promissory note, under Stat. 3 & 4 Anne, c. 9, § 1. It was an agreement, by which the maker undertook to pay Johnson the sum mentioned in the note; and Johnson undertook, on such payment, to deliver back the deeds. While the instrument was in the hands of the payee, the maker was entitled to require the redelivery of the deeds upon the payment of the money, and was not bound to pay if that redelivery were refused. It never could have been the intention of the parties that Johnson should have a right to hand over the defendant's title-deeds, and that they should pass from hand to hand; nor could Johnson transfer the note without the deeds; for the defendant had a right to insist upon the delivery of the deeds from the person who had the note. It can make no difference that the deeds had been delivered up to the defendant before the indorsement; for a note which is not transferable at the time it is made is not rendered so by any subsequent event. *Hill v. Harford*.¹ The present plaintiff cannot be in a better situation than Johnson. An agreement to pay money on redelivery of deeds cannot constitute a promissory note under the statute of Anne, any more than a conditional order to pay would be a bill of exchange within the custom of merchants: the two securities are placed on the same footing by the statute. [LITLEDALE, J. In the case of a mortgage, or a deposit, the debt may be sued for by the mortgagee without delivering up the deeds. COLERIDGE, J. How can a collateral security fetter the principal security?] The securities are given by the same instrument; and the effect of the one is therefore controlled by the other. [He then commented upon the evidence, and upon the remarks made upon it by the Lord Chief Baron to the jury.]

LORD DENMAN, C. J. With respect to the admissibility of the note in evidence, if it be a promissory note, the stamp is right. And there is nothing to qualify its character. There is only a memorandum added of something else; but that is not imported into the main agreement.

LITLEDALE, J. This is an absolute promissory note; and there is no qualification. There is a memorandum, that deeds are deposited as a collateral security; but, as a note, the instrument is quite valid

without a mortgage stamp. Besides, the restriction, which prohibits stamping a promissory note after it is made, applies only to the promissory note stamp. The fact that an instrument, which, in the character of a mortgage, may be stamped after it is made, contains also a promissory note, amounts to nothing. The meaning of the legislature was, merely, that parties should not take their chance on a promissory note by delaying the stamping till they wanted to produce it in evidence as a promissory note; but that does not prevent a mortgage, which happens also to be a promissory note, from having a mortgage stamp put on after it is made. *Butts v. Swan*¹ was a very different case. There the agreement stamp, put on after the instrument was made, was held insufficient, because the order to pay the money was so incorporated with the instrument that the latter could not be used without calling in aid its operation as a promissory note. We need not enter into the question, whether it be necessary that there should be an assignment stamp. I do not know that an assignee of this instrument could at law avail himself of it, against the maker, as a mortgage.

PATTESON, J. This is not the less a promissory note, from its being also an agreement of another kind. The cases cited by Mr. Whitehurst apply merely where there has been no promissory note stamp before the making.

COLERIDGE, J. If this be a promissory note, no difficulty remains. It is not the less a promissory note, from a memorandum of another kind being added, importing that a collateral security has also been given.

The court took time for consideration as to the other grounds of motion; and afterwards (May 5th) the rule was *Refused*.²

¹ 2 B. & B. 78.

² *Fancourt v. Thorne*, 9 Q. B. 312; *Brill v. Crick*, 1 M. & W. 232; *Trotter v. Shell*, Mor. Dict. Decis. 1402; *Fleckner v. U. S. Bank*, 8 Wheat. 338; *Early v. McCart*, 2 Dana, 414; *Maskell v. Haifleigh*, 8 La. An. 457; *Nott v. Watson*, 11 La. An. 664; *Treat v. Cooper*, 22 Me. 203; *Union Ins. Co. v. Greenleaf*, 64 Me. 123; *Branning v. Markham*, 12 All. 454; *Taylor v. Curry*, 109 Mass. 36; *Wright v. Irwin*, 33 Mich. 32; *Matthews v. Crosby*, 56 N. H. 21; *Ellet v. Britton*, 6 Tex. 229; *Ward v. Perrigo*, 33 Wis. 143, *accord*. — ED.

A. LEONARD v. MASON.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1828.

[Reported in 1 Wendell, 522.]

ERROR from the Onondaga Common Pleas. A. Leonard sued Mason in a justice's court, on an order for the payment of money accepted by Mason. The plaintiff held a promissory note against one N. Leonard for \$34.48, underneath which was written an order or bill of exchange, in these words:—

“Levi Mason, Esq., please pay the above note, and hold it against me in our settlement. N. LEONARD.”

The justice gave judgment for the defendant, and the plaintiff appealed to the Onondaga Common Pleas. On the trial in that court, the note, with the order written thereunder, was produced, and a presentment to, and a parol acceptance and promise to pay by, the drawee proved. The Common Pleas nonsuited the plaintiff, holding the promise of the defendant to be within the Statute of Frauds.

J. R. Lawrence, for plaintiff in error. The order was in the nature of a bill of exchange, and a parol acceptance was good. Cowen's Tr. 84; 15 Johns. R. 6; 4 Camp. 393; Chitty on Bills, 76; 2 Wheaton, R. 66; Strange, 1000; 3 Burr. 1886. After acceptance, the order was a chose in action, on which an assignee might have maintained a suit, on showing a promise to pay. 1 Cowen, 13; 6 id. 151.

B. Davis Noxon. This was a promise to pay the debt of another, and therefore within the Statute of Frauds, as there was no consideration shown for the promise. 3 Johns. R. 210; 4 id. 422. The order cannot be considered a bill of exchange. 6 Cowen, 108.

Gridley, in reply. This case is clearly distinguishable from that in 6 Cowen. The bill here is not payable on a contingency. There was no difficulty in the taking up the note. The bill and note were on the same paper.

By the Court, SAVAGE, C. J. The only question is, whether the order which the defendant accepted is a good bill of exchange: if so, a parol acceptance is good. It is supposed that this case depends on the same principles as the case of *Cook v. Satterlee & Satterlee*.¹ The rule there recognized is that a bill of exchange must be for the payment of money, and nothing else. In that case, the drawees were required to pay a certain sum of money, and take up a note given by the drawer to a third person. Here it is to pay a note, which is referred to merely to ascertain the amount;² and the retaining the

¹ 6 Cowen, 108.

² See *Commw. Ins. Co. v. Whitney*, 1 Met. 21. — ED.

note as a voucher is no more the performance of another act beside the payment of the money, than the retaining the order itself for the same purpose.

The Court erred. The judgment must be reversed, and a *venire de novo* is awarded to Onondaga Common Pleas.¹

OVERTON v. TYLER AND ANOTHER.

IN THE SUPREME COURT, PENNSYLVANIA, JULY TERM, 1846.

[Reported in 3 Barr, 346.]

IN error from Common Pleas of Bradford County.

July 15. This was a feigned issue, directed to test the right of the parties to the proceeds of a sheriff's sale of the personal property of L. Smith, in which a special verdict was found, in substance, as follows : L. Smith drew a promissory note, falling due June 30, 1845, for discount at bank, which was indorsed for him by Tyler *et al.* as sureties. While this note was maturing, he gave to Tyler the following instrument : —

“\$1,000.

ATHENS, Feb. 15, 1845.

“For value received, I promise to pay Francis Tyler and Levi Westbrook or bearer one thousand dollars, with interest, by the first day of June next. And I do hereby authorize any attorney of any court of record in Pennsylvania to appear for me, and confess judgment for the above sum to the holder of this single bill, with costs of suit, — hereby releasing all errors, and waiving stay of execution and the right of inquisition on real estate ; also waiving the right of having any of my property appraised which may be levied upon by virtue of any execution issued for the above sum.

L. SMITH.”

This was to secure them as indorsers of the above-mentioned note.

On this, a judgment was entered on the 10th of March ; and an execution was left with the sheriff on the 2d of June. Under this, the money was paid into court arising from the sale of personal property. Prior to the sale, which was on the 2d and 3d of July, Overton left with the sheriff an execution on a judgment in his favor. The jury found that Tyler had paid the first-mentioned note, after protest, and on or before the 3d of July.

The Court (CONYNGHAM, P. J.) gave judgment for Tyler ; and this writ of error issued.

¹ Conf. Cook v. Satterlee, 6 Cow. 108. — ED.

Case and Overton, for plaintiff in error. The days of grace are part of the contract. 1 Pet. S. C. Rep. 25; *Thomas v. Shoemaker*.¹ Nor will the fact that a warrant of attorney is attached alter or in any way affect that right: it is to be construed as if the note and the warrant were distinct instruments. A suit, then, not being maintainable before the 5th of June, of course no execution could issue for the same debt at an earlier period.

Elwell and Williston, contra, contended that, by the agreement, the judgment was to be entered as for an amount due on the 1st of June, and that the character of the note, if such it was, merged in that contract. But there never was a privilege of the days of grace: the judgment could not pass from hand to hand; and subsequent holders would certainly be bound to defalk any payments made on account of the judgment. These are principles irreconcilable with the rules regulating commercial paper. 3 Penn. Rep. 374; 1 Watts, 135; 1 Miles, 162; 6 Johns. Ch. Rep. 281; 2 Term Rep. 640.

GIBSON, C. J. No case like the present, nor any thing from which a principle applicable to it can be drawn, is found in the books. The note is for the payment of money: it is payable to bearer, and it is payable absolutely; yet it is obvious that it was not intended to be negotiable in a commercial sense, and that the maker was not to have the usual days of grace. The debt is still between the original parties; and the contract by which it was created is to be interpreted, like any other, by their actual meaning. If they meant to make, not a promissory note within the statute of Anne, but a special agreement, with power to enter up judgment on it, they are bound by the result as they themselves viewed it. Such is one of the principles of *Patterson v. Poindexter* and *Boker v. Hazard*,² in which, however, there was no express promise. Nor would a subsequent holder take the paper on any other terms than those expressed in it. It has in it all the parts of a promissory note; but it has more: it contains not only a warrant to confess judgment with a release of errors, but an agreement to waive appraisement and stay of execution. But a negotiable bill or note is a courier without luggage. It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and, though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it, and destroy it. But a memorandum which is merely directory or col-

¹ 6 Watts & Serg. 179.

² 6 Watts & Serg. 231.

lateral will not affect it. The warrant and stipulations incorporated with this note evince that the object of the parties was not a general, but a special one. Payment was to be made, not as is usual, at so many days after date, but at a distant day certain: yet the negotiability of the note, if it had any, as well as its separate existence, was instantly liable to be merged in a judgment, and its circulation arrested by the debt being attached as an encumbrance to the maker's land; and it was actually merged when it had nearly three months to run. Now it is hard to conceive how the commercial properties of a bill or note can be extinguished before it has come to maturity. That is not all. A warrant to confess judgment, not being a mercantile instrument, or a legitimate part of one, but a thing collateral, would not pass by indorsement or delivery to a subsequent holder; and a curious question would be, whether it would survive as an accessory separated from its principal, in the hands of the payee for the benefit of his transferee. I am unable to see how it could authorize him to enter up judgment, for the use of another, on a note with which he had parted. But it may be said that his transfer would be a waiver of the warranty as a security for himself or any one else, and that subsequent holders would take the note without it. The principle is certainly applicable to a memorandum indorsed after signing, or one written on a separate paper. But the appearance of paper, with such unusual stipulations incorporated with it, would be apt to startle commercial men as to their effect on the contract of indorsement, and make them reluctant to touch it. All this shows that these parties could not have intended to impress a commercial character on the note, dragging after it, as it would, a train of special provisions, which would materially impede its circulation. As it was not a negotiable note within the statute, the usual days of grace could not be added to the ostensible day of payment; and, as the judgment was ripe at the expiration of that day, the execution was sustained by it, and, being prior in delivery to the sheriff, was entitled to priority of satisfaction.

*Judgment affirmed.*¹

¹ "PER CURIAM. This case does not differ in the least degree from that in *Overton v. Tyler et al.*, 3 Barr, 346, in which it was held that such a judgment-note was not a negotiable instrument under the law-merchant. Indeed, the note in this instance has some provisions in it not in that in *Overton v. Tyler*. The reference made by Read, J., in *Zimmerman v. Anderson*, 17 P. F. Smith, 421, to the case of *Osborn v. Hawley*, 19 Ohio, 130, was *arguendo*, and only to show how far the rule as to non-negotiable paper had been relaxed in other States. But he clearly did not intend to admit its authority; for he proceeded to distinguish the case before him from our own case of *Overton v. Tyler*, without questioning the authority of the latter. The note in this case was not negotiable by reason of the warrant of attorney contained in it." *Sweeney v. Thickstun*, 77 Pa. 134.

Osborn v. Hawley, 19 Ohio, 130, *contra*. — ED.

ARNOLD *v.* THE ROCK RIVER VALLEY UNION R.R.
CO., HYATT SMITH, AND J. BODWELL DOE.

IN THE SUPERIOR COURT, CITY OF NEW YORK, JANUARY, 1856.

[*Reported in 5 Duer, 207.*]

THIS action came before the court on an appeal from a judgment in favor of the plaintiff. It was tried before Oakley, C. J., and a jury, on the 19th of March, 1855.

The action was brought upon an instrument in the words and figures following, viz. :—

“\$5,000.

NEW YORK, Jan. 31, 1853.

“Six months after date, the Rock River Valley Union Railroad Company promises to pay to the order of A. Hyatt Smith and J. Bodwell Doe, for value received, at the Hanover Bank of this city, five thousand dollars, having deposited with Elisha Peck, as collateral security and pledge for the payment of this note, ten bonds of the said railroad company, of one thousand dollars each, numbered as follows—758, 759, 760, 761, 762, 763, 776, 783, 784, 786—and we hereby give the said Peck full power and authority, on the non-payment of this note at maturity, or at any time thereafter, to sell said bonds at the broker’s board, in this city, or at public or private sale, or so many as shall pay this note, on giving six days’ notice, by advertising in the ‘Journal of Commerce,’ in this city, and apply the proceeds of said bonds to the payment of this note; and in case the proceeds thereof, after paying the principal and interest due thereon, with all expenses of sale, shall be insufficient, we hold ourselves bound to pay the balance on demand.

“A. HYATT SMITH, *President*.

[L.S.]

“WM. A. LAWRENCE, *Secretary*.”¹

The plaintiff having rested upon producing this document, the counsel of the defendants moved for a nonsuit, on the grounds :—

That the instrument given in evidence was not a promissory note, but an agreement, on the part of the company, to pay the difference between what the bonds might bring on a sale and \$5,000, should the proceeds of such sale be less than that sum, and the expenses of the sale; and that the defendants, Smith and Doe, were not liable thereon.

The Judge denied the motion, and exceptions were duly taken.

A verdict was then taken for the plaintiff for \$5,570.27, the amount of the note and interest, on which judgment was entered.

¹ See *supra*, p. 19, note 4. —ED.

The defendants appealed from the judgment.

J. E. Develin, for appellants.

H. E. Mather, for respondent.

By the Court, BOSWORTH, J. The objection, that the instrument sued upon is not a negotiable promissory note, is deserving of more consideration.

We do not think there is any thing in the objection that it is, in effect, a contract to pay the difference between the amount of the proceeds of the bonds, after a sale thereof, and the amount of the note. The holder is not, by its terms or legal effect, precluded from suing upon it, until after the bonds shall have been sold. When the day of payment had passed, his right of action was perfect, and a recovery might be had against all the parties for the whole amount, if there was no objection to a recovery, except the one that the bonds had not been sold.

The only important question is this: Is an entire contract, part of which is in form a good promissory note, but which also contains a special contract, in relation to the money promised to be paid, a good promissory note, negotiable by statute, as to so much of the contract as is, in form, a promissory note.

By this instrument, ten bonds are pledged as security for the payment of the \$5,000. By it, Elisha Peck is made a trustee, to hold and sell the bonds, and apply the proceeds. The mode of sale is agreed upon; and, on pursuing the mode specified, the maker agrees to pay the balance that may remain, after applying the proceeds in satisfaction of all expenses of the sale, and in reduction of the principal and interest due thereon. See *Allen v. Dykers & Alstyne*.¹

The terms of this contract do not modify that part which contains a promise to pay, absolutely, to the order of the persons named in it, a sum certain, and on the day specified.

The only objection is that it contains a contract, collateral to the promise to pay the \$5,000, by which the maker of the paper may be subjected to a liability, which the law would not impose, upon the mere fact, of a deposit of the bonds as collateral security, without any special agreement as to the manner of selling them.

It will hardly be pretended that, in the absence of any special agreement, the pledgee of stocks, deposited as security for the payment of a note of the pledgor, discounted by him, could sell in the manner and upon the notice specified in this contract, and apply the proceeds, first, to pay all expenses of such a sale, and the residue on account of the principal and interest, and then, as a matter of course, recover the balance due on the note. The pledgor of the stocks

¹ 3 Hill, 593.

would not be concluded by a sale made in such a manner, and on such a notice, in the absence of any special contract in relation to it.

It cannot properly be said, therefore, in this case, as was said in *Wise v. Charlton*, that the instrument recites or contains nothing except what the law would imply. In that case, the note merely recited the fact that title-deeds had been deposited as security.

The essentials of a negotiable promissory note, as stated in elementary books and in adjudged cases, are that it must be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and that it must be for the payment of money only, and not for the performance of any other thing, or in the alternative. *Cook v. Satterlee*.¹

In *Bolton v. Dugdale*,² the instrument was, in form, a promissory note, as to a promise to pay £30 and interest. By it, the maker also promised to pay a sum, which was uncertain, to a third person, in part of interest, and "the remaining stock and interest," or the balance, on demand. This was held not to be a promissory note. The sum payable to the third person being uncertain left the sum payable to the payee uncertain. That case, therefore, does not touch the proposition, that a note ceases to be negotiable, because it contains a collateral contract, in no way modifying the terms or legal effect of that part which by itself is a promissory note.

In *Davies v. Wilkinson*,³ the instrument contained a promise to pay to Charles Davies or order £695, in four instalments, one of £200, and two £150 each, and one of a £100, at times specified, and the remaining £95 was to go as a set-off against certain matters specified. The court held it, in form, not a promissory note, as to the sum of £600.

Lord Denman said: "It is a note up to a certain point, but it ends, '£95 to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt, owing from C. Davies to him.' I think that takes from it the character of a promissory note, and makes it an agreement."

Littledale, J. To be a promissory note, the writing should be one entire instrument. Here the instrument, as to £95, is not a promissory note.

Patteson, J. This is an instrument to pay £695, in the whole, by the means stated. The £95 was not to be paid to Davies, and could not be payable to his indorsee: the instrument, therefore, was not a promissory note.

There may be said to be this difference between that case and the present. In that case, the whole sum promised to be paid was not

¹ 6 Cow. 108.

² 4 Barn. & Ad. 617.

³ 10 Ad. & E. 98.

payable to the payee named in it, or to his order, or to bearer. Part of an entire sum promised to be paid was not payable in money, nor to the person to whose order the residue was made payable. In this case, the whole sum is payable in money absolutely, and to the order of two of the defendants.

In *Storm v. Stirling*, the question was raised upon an instrument in terms very much like those of the one now under consideration. The court, after stating the arguments for and against the proposition, that the instrument was a promissory note, forbore to decide the question. It is probably a just inference, that the court was not willing to express an opinion that the instrument was clearly a promissory note, unaffected as such by the collateral or additional contract which it contained. Some of the remarks of Lord Campbell, however, indicate that he inclined to that view of its character.

In *Willoughby v. Comstock*,¹ an action was brought by an indorsee of an instrument very similar to the one in question, but less special in its provisions, against the maker, and a recovery was had; but the point that it was not negotiable was not taken.

In the present case, the collateral or additional contract, which the instrument embodies, relates solely to the money promised to be paid. It provides a security for the payment of the money, prescribes the mode of converting the security, how the proceeds shall be applied, and the extent of the maker's liability under the collateral contract, after the security shall have been exhausted in the manner stipulated.

If this collateral contract had been written on a separate instrument, although executed and delivered contemporaneously with the note, the fact of its having been so made would not affect the negotiable character of the note itself. The pledge or collateral security for the payment of the note would in equity belong to every successive *bona fide* holder of the note for value. Although, therefore, the indorsement of the note would not, in law, transfer any title or right to the security created by the collateral contract, yet in equity it would work such a transfer. As this collateral or additional contract does not, in any respect, modify any clause of the note itself, nor affect in any manner the liability of any party to it, as such party (unless it deprives the note of its negotiable character as such, which is the point to be determined), we do not see that any injurious consequences can result from holding that the note, notwithstanding the addition of such contract, continues as to its negotiability unaffected by it.

Such an instrument is quite different from one which, in addition to a note perfect in form, should contain a contract having no relation to

¹ 3 Hill, 389.

the money promised to be paid, and wholly independent of it. If the additional contract was for the sale or leasing of land, or the sale or exchange of personal property, or related to any other distinct and independent subject, there would be many reasons for declaring the instrument not negotiable, which can have no application to that under consideration.

Instruments like the present are of common use. The persons indorsing them undoubtedly intend to stand in the position, and to incur the liabilities of indorsers of commercial paper, and if charged at all, to be charged by the means by which the liability of all indorsers becomes fixed. Allowing an instrument, like that in suit, to be treated and enforced as a negotiable note, cannot be made a precedent for holding instruments negotiable, which, in addition to containing a promise for the absolute payment of money, contain promises for the performance of other acts, having no reference to or connection with the money promised to be paid.

We are of the opinion that the plaintiff is entitled to enter a judgment on his verdict.¹

HODGES v. SHULER AND ANOTHER.

IN THE COURT OF APPEALS, NEW YORK, SEPTEMBER, 1860.

[*Reported in 22 New York Reports, 114.*]

APPEAL from the Supreme Court. The action was against the defendants as indorsers of the following instrument or note:—

“RUTLAND AND BURLINGTON RAILROAD COMPANY.

“No. 253.

\$1,000.

“BOSTON, April 1, 1850.

“In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay, in Boston, to Messrs. W. S. & D. W. Shuler, or order, \$1,000, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits

¹ *Knipper v. Chase*, 7 Iowa, 145; *Haynes v. Beckman*, 6 La. An. 224; *Collins v. Bradbury*, 64 Me. 37, *accord.*—ED.

shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

"SAM. HENSHAW, *Treasurer*.

"T. FOLLETT, *President*."

At the time the suit was brought, there was an unpaid interest warrant attached, and which was attached at the time of indorsement.

The answer of the defendants put in issue none of the allegations in the complaint except those in respect to presentment, notice and protest.¹

The court decided that the plaintiff was entitled to recover against the defendants, and gave judgment accordingly. The defendants excepted to the decision, as follows : —

The court erred in deciding that the defendants were liable upon the instrument set forth in the complaint by their indorsement.

The Supreme Court affirmed the judgment; and the defendants appealed to this court.

John K. Porter, for the appellant.

John B. Gale, for the respondent.

WRIGHT, J. The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot for the reasons: 1st, That the instrument set out in the complaint is neither in terms nor legal effect a negotiable promissory note, but a mere agreement; the indorsement in blank of the defendants operating, if at all, only as a mere transfer, and not as an engagement to fulfil the contract of the railroad company in case of its default; and, 2d, That, if it be a note, the notice of its dishonor was insufficient to charge the defendants as indorsers.

Whether the blank indorsement of the defendants imports any binding contract depends on the law of Massachusetts; in which State it is to be assumed, from the facts in the case, that the original instrument and indorsement were made. But the law of Massachusetts does not differ from that of this State, or of England, in any particular material to the present inquiry. In Massachusetts there has been apparently a relaxation of the common-law rule so far as to extend the remedy against indorsers to notes payable absolutely in a medium other than cash; but in all other respects the legal rules applicable to negotiable paper are the same in that State as in our own.

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money

¹ See *supra*, p. 19, note 4. — ED.

or stock, and thus fulfil their promise in either of two specified ways. In such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus cancelling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of \$1,000 in four years from date; and its promise could only be fulfilled by the payment of the money at the day named.

The judgment of the Supreme Court should be affirmed.

All the judges agreed that the instrument in suit was a promissory note. DENIO and WELLES, JJ., dissented on the ground that the notice of non-payment was insufficient in omitting the number upon the margin of the note.

*Judgment affirmed.*¹

HOSSTATTER v. WILSON.

IN THE SUPREME COURT, NEW YORK, FEBRUARY, 1862.

[Reported in 36 Barbour, 307.]

THIS action was brought by the plaintiff as the owner and holder of four several promissory notes, made and signed by the defendant. The following is a copy of one of said notes:—

“\$55.

WILLIAMSBURGH, Dec. 20, 1859.

“Four months after date, I promise to pay to the order of M. W. Wilson fifty-five dollars, at my store, No. 134 4th Street (or in goods on demand), value received.

(Signed)

“M. W. WILSON.”

¹ Hotchkiss v. Nat. Banks, 21 Wall. 354; Vermilye v. Adams, 21 Wall. 138; Weld v. Sage, 47 N. Y. 143; Dinsmore v. Duncan, 57 N. Y. 573, accord.

Leavitt v. Blatchford, 17 N. Y. 521, 540, 545, contra.—ED.

Said note being indorsed in blank "M. W. Wilson" and "Hosstatter & Henssel." The other notes bore the same date, and were in the same form, but for different amounts, and were all indorsed in blank by M. W. Wilson.

The complaint alleged that neither the plaintiff nor any other holder of said notes, or any of them, ever elected to take payment thereof in goods, as provided therein; that the same are wholly due and unpaid, and that the defendant was justly indebted to the plaintiff thereon, in the amount of \$295, being the aggregate amount of said four notes, together with interest; for which sum the plaintiff demanded judgment. The defendant demurred to the complaint, on the ground that it appeared on the face thereof that it did not state facts sufficient to constitute a cause of action. After argument, at special term, the demurrer was overruled with costs; and the defendant appealed.

R. H. Huntley, for the appellant.

Lawton & Larned, for the respondent.

By the Court, *INGRAHAM, P. J.* The notes declared on in this action were promises to pay the amounts therein mentioned as dollars, or *in goods on demand*. The complaint merely gives copies of the notes, with an averment that no holder of the notes had ever elected to take payment in goods. The defendant demurred to the complaint, on the ground that there was no cause of action stated therein. The demurrer was overruled. The decision of the questions arising on the demurrer depends upon the question whether the instrument is a promissory note. If it is, then the complaint is sufficient.

The essential requisite of a promissory note is that it must be payable in money absolutely and without any contingency. Such payment must be precise and certain. *Chitty on Bills*, 152, 9th ed.; *Story on Prom. Notes*, § 22. So a written promise to pay the bearer a certain sum of money in goods is not a valid promissory note. *Story*, § 17; 7 *John*. 321; 1 *Cow*. 691. If there appears upon the face of the note any contingency which would make it payable in any thing other than money, then it does not possess the negotiable qualities of promissory notes, and becomes a mere contract. It is an alternative agreement to pay a sum of money or do some other act. In the present case the debtor promises to pay in money. He has no election to do any thing else. If the holder chooses, he may surrender the note and receive goods; but that rests entirely with himself, and no choice is left to the debtor.

Upon the argument, my impressions were adverse to the sufficiency of this complaint; but a late case in the court of appeals has, I think, established a contrary doctrine. In *Hodges v. Shuler*, it was held

that a note of a corporation, for a specific sum, with a fixed time for payment, and containing the condition that the holder might within a given time surrender the note, and receive stock in lieu thereof, was a promissory note. This was no other than a note for money, or in case the holder elected, within the time specified, to be paid in stock. Wright, J., says : "The instrument is a promissory note. It is for the unconditional payment of money, at a specified time, to the payee's order. It was not optional with the makers to pay in money or stock, and thus fulfil their promise in either of two specified ways : in such case, the promise would have been in the alternative." And again, "Although an election was given to the promisees upon a surrender of the instrument to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay."

Whatever views I might otherwise entertain of this question, I think the decision last cited covers this case and controls us in the disposition of this question.

It was said that the averment that no demand had been made for the goods sustained the grounds taken by the defendant. Upon that point I have no difficulty. The answer to it is that the averment is unnecessary. The matter was only available as a defence if the demand had been made and complied with. Even if the demand for goods has been made, the debtor would not have been relieved from his obligation to pay in cash, except by delivering the goods demanded. In case of omitting to do so, the obligation to pay remained. If he had paid, the note would have been surrendered.

The judgment of the special term should be affirmed, with costs.¹

¹ Owen v. Barnum, 7 Ill. 461. "We promise to pay A. S. Barnum, or bearer, \$583. The said Barnum is to take all the flour that he may want for family use, and such other articles as he may need previous to the day of payment," &c.

Preston v. Whitney, 23 Mich. 260. "I promise to pay to the order of M. Preston \$70," &c. "This note is to be valid, as part pay for a pianoforte of me at retail prices," &c.

Cate v. Patterson, 25 Mich. 191. A certificate of deposit, "payable to the order of Rufus Cate, with interest if left three months, on the return of this certificate," &c., *accord.*

Dennett v. Goodwin, 32 Me. 44. "I promise to pay Daniel Dennett, or order \$40 in one year, and interest ; or payable on demand, if called for, in blacksmith's work at cash price," &c., *contra.* — Ed.

ZIMMERMAN & HERDIC, INDORSEES, v. ANDERSON.

IN THE SUPREME COURT, PENNSYLVANIA, JANUARY TERM, 1871.

[Reported in 67 *Pennsylvania Reports*, 421.]

THIS was an action of assumpsit, brought March 13, 1869, by Frederick Zimmerman and Frank L. Herdic, indorsees of E. Lowe against Moses Anderson.

The cause of action was the following note :—

“\$125.00. TOWNSHIP OF BUFFALO, March 25, 1868.

“Six months after date, I promise to pay E. W. Lowe, or order, one hundred and twenty-five dollars, for value received, with interest, waiving the right of appeal, and of all valuation, appraisement, stay and exemption laws.

MOSES ANDERSON.

“Indorsed, ‘E. W. Lowe.’”

The defendant filed an affidavit of defence, setting out a failure of the consideration of the note.

On the trial, May 18, 1870, before Woods, P. J., the plaintiffs offered the note in evidence: it was objected to, as not being negotiable, rejected by the court, and a bill of exceptions sealed. The court charged:—

“The note offered in evidence, not being negotiable, has been rejected, and consequently there is no evidence to sustain the action, and you will have to find for defendant.”

The verdict was for the defendant.

On the removal of the record to the Supreme Court, the plaintiff assigned the rejection of the offer of evidence and the charge of the court for error.

G. F. Miller (with whom was *J. W. Maynard*), for plaintiffs in error. If a note is payable in money and to order or bearer, it is negotiable. *Gray v. Donahoe*,¹ *McCormick v. Trotter*;² Act of April 5, 1849, § 11, Pamph. L. 427; *Purd. 111*, pl. 6; *Osborn v. Hawley*.³

J. C. Bucher and *J. M. Linn*, for defendant in error. They referred to *McCullough v. Houston*,⁴ *Lewis v. Reeder*,⁵ *Camp v. Walker*,⁶ *Bullock v. Wilcox*,⁷ *Hughes v. Large*;⁸ 3 *Kent's Com.* 72, 76, 89; *Judah v. Harris*, *Overton v. Tyler*; *Story on Promissory Notes*, § 1.

The opinion of the court was delivered Feb. 9, 1871, by READ, J. The paper in this case comes within all the definitions of the best text-writers of a promissory note; for it is a written promise by the defend-

¹ 4 Watts, 400.

² 10 S. & R. 94.

³ 11 Ohio, 130.

⁴ 1 Dall. 444.

⁶ 9 S. & R. 197.

⁵ 5 Watts, 482.

⁷ 7 Watts, 328.

⁸ 2 Barr, 104.

ant to pay to E. W. Lowe, or order, one hundred and twenty-five dollars, six months after date, for value received, with interest, absolutely and at all events. But it is urged that the words "waiving the right of appeal, and of all valuation, appraisements, stay and exemption laws," destroy its negotiability. In what way? They do not contain any condition or contingency, but after the note falls due and is unpaid, and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability, it adds to it, and gives additional value to the note.

In *Fancourt v. Thorne*,¹ a note in the following form was held to be a promissory note :—

"LONDON, Sept. 16, 1833.

"On demand, I promise to pay William Thomas Hodsell, or order, the sum of five hundred pounds, for value received, with interest at the rate of four per cent; and I have lodged with the said William Thomas Hodsell the counterpart leases signed by George Davis, John Jewell, William Hill, and William Gould, for ground let by me to them respectively, as a collateral security for the said five hundred pounds and interest.

WM. THORNE."

So a note payable by instalments is within the statute, although it contain a provision that on failure of payment of one instalment the whole debt is to become payable. Such a condition is not a contingency. *Carlton v. Kenealy*.

The same doctrine is held by the Lords Justices *In re General Estates Co., Ex parte City Bank*.²

In *Hodges v. Shuler*, an instrument was held a promissory note which had the following words in the body of it: "or upon the surrender of this note, together with the interest warrants not due to the treasurer at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the said period." Judge Wright said, p. 118: "We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day, and although an election was given to the promisees upon a surrender of the instrument six months before its

¹ 9 Ad. & E. N. S. (58 E. C. L. R.) 312.

² 3 Ch. Appeal Cases, Law Rep. 758.

maturity to exchange it for stock, this did not alter its character, or make the promise in the alternative in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of \$1,000 in four years from date, and its promise could only be fulfilled by the payment of the money at the day."

Mr. Parsons, in his Treatise on Bills and Notes, Vol. I. p. 147, says: "But if it leaves the payment as to all circumstances of time, amount, and person, as certain, or at least as obligatory as before, and only provides or declares that certain security attaches to the note, or that certain rights go with it, or that the amount when paid is to be appropriated in a certain way, then it leaves the paper still negotiable." This doctrine is fully sustained by the cases cited in the note. In *Osborn v. Hawley*,¹ it was held that a power of attorney to confess judgment attached to the note, and forming a part of the same instrument, did not destroy the negotiability of the note. The court said that the power does not in any way change the legal character of the note except that it gives a more summary proceeding for its collection.

These principles and cases clearly prove this to be a regular negotiable promissory note, but we are met by the case of *Overton v. Tyler*, decided by this court a quarter of a century ago, which is, however, plainly distinguishable from the one before us. In *Overton v. Tyler*, the payment was fixed for a day named specifically in the instrument, with a regular power of attorney to confess judgment, upon which a judgment was entered on the 10th March, and execution issued thereon on the 2d June, one day after the money was payable, and the waivers which followed all related to the judgment thus entered, two months and twenty-one days before the paper fell due.

It is unnecessary to say how far this ruling is sustained by the authorities, for, if perfectly good and sound law, it does not touch the present case.

The Court therefore erred in rejecting the note.

*Judgment reversed, and a venire facias de novo awarded.*²

¹ 19 Ohio, 130.

² *Walker v. Woollen* (Indiana, February, 1877), 4 C. L. J. 248; *Zimmerman v. Rote*, 75 Pa. 188, *accord.* — Ed.

SECTION VI.

The Payment must be certain.

(a) IN AMOUNT.

SMITH AND HIS WIFE, ADMINISTRATRIX, &c., v. NIGHTINGALE.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, JUNE 11, 1818.

[*Reported in 2 Starkie, 375.*]

THIS was an action by the plaintiffs, in right of the wife as administratrix of James Eastling.

The declaration contained a count upon a promissory note, alleged to have been made by the defendant, on the 12th of October, 1807, for the payment of £64 to James Eastling, payable three months after the date. The declaration contained also the money-counts, and a count upon an account stated.

It appeared that Eastling had been employed by the defendant as a servant in husbandry, and that the defendant, having in his hands moneys belonging to James Eastling, gave him the following promise in writing, upon which the first count in the declaration was founded:—

“OCT. 12, 1807.

“I promise to pay to James Eastling, my head carter, the sum of £65, with lawful interest for the same, three months after date, and also all other sums which may be due to him.”

On the part of the defendant, it was objected that this instrument could not be considered as a promissory note, since it was not made for the payment of any certain sum, and that it could not be given in evidence under the count upon an account stated, since it was an agreement, and for a larger sum than £20, and ought to be stamped.

Gurney, for the plaintiff, contended that it was certain to the extent of £65, and therefore that to that extent the plaintiff was entitled to consider it as a promissory note; but that, at all events, it was evidence of an account stated, and that no stamp was essential to a mere acknowledgment of a debt; but—

LORD ELLENBOROUGH was of opinion that the instrument was too indefinite to be considered as a promissory note: it contained a promise to pay interest for a sum not specified, and no otherwise ascertained than by reference to the defendant's books; and that, since the whole constituted one entire promise, it could not be divided into

parts. He also held that, since the instrument contained an agreement to pay the money, it could not be received in evidence as an acknowledgment without a stamp.¹ *The plaintiff was nonsuited.*¹

CARLON *v.* KENEALY.

IN THE EXCHEQUER, NOV. 22, 1843.

[Reported in 12 Meeson & Welsby, 139.]

ASSUMPSIT by the indorsee against the maker of a promissory note. The declaration stated that the defendant on, &c., made his promissory note in writing, and delivered the same to T. C., and thereby promised to pay the said T. C., or order, £52 10s., by two equal instalments, on the 1st of May, 1843, and the 1st of November, 1843, and that the whole amount, £52 10s., should become immediately payable on default being made in payment of the first instalment. The declaration then averred that T. C. indorsed the note to the plaintiff; that the defendant made default in payment of the first instalment, and that he had not paid the amount of the note.

Special demurrer on the ground that, the second instalment on the said promissory note being made payable by way of condition, and penalty immediately on default in payment of the first instalment, the note was not made according to the custom of merchants with regard to inland bills of exchange, and consequently the title thereto, and the right of action thereon, could not pass by indorsement. Joinder in demurrer.

Lush, in support of the demurrer. The question in this case is, whether a note in this form is assignable within the Stat. 3 & 4 Anne, c. 9. There is no case directly in point, and the court therefore has to determine the question on general principles. Now it is the essential characteristic of a negotiable instrument that the rights and liabilities of the several parties to it shall be the same in their nature, subject only to differences in degree. This court has undoubtedly decided already that a promissory note payable by instalments is good, and that the days of grace are to be allowed on it. *Oridge v. Sher-*

¹ See *supra*, p. 19, note 4. — Ed.

² *Bolton v. Dugdale*, 4 B. & Ad. 619; *Ayrey v. Fearnside*, 4 M. & W. 168; *Barlow v. Broadhurst*, 4 Moore, 471; *Kennedy v. Adams*, 2 Pugs, 162; *Dodge v. Emerson*, 34 Me. 96; *Marrett v. Eq. Ins. Co.*, 54 Me. 537; *Lime Rock Ins. Co. v. Hewett*, 60 Me. 407; *Cushman v. Haynes*, 20 Pick. 132; *Fiske v. Witt*, 22 Pick. 83; *Palmer v. Ward*, 6 Gray, 340; *Dilley v. Van Wie*, 6 Wis. 209, *accord*.

Greene v. Austin, 7 Iowa, 521; *Kalfus v. Broadhurst*, Litt. Sel. Cas. 197; *Ring v. Foster*, 6 Oh. 279, *contra*. — Ed.

borne.¹ But this is a different case. Here, by the terms of the note, the whole amount is to become payable on default being made in payment of the first instalment. Does the original three days' grace apply to that payment of the whole amount, the payment of the second instalment being by the contract accelerated in that event? If there be no default in payment of the first instalment, the defendant is entitled to three days' grace on the second: if he makes default, is he to have the same privilege? If so, the declaration would be bad for not averring presentment, the second payment being in the nature of a forfeiture. [PARKE, B. No: he must take care to pay the first instalment when due, and, if he makes default in doing so, he contracts to pay the whole.] Then what is the liability of the indorser? Is he liable in such case to the payment of the whole? or ought he not to have the same opportunity of paying the first instalment, and saving the forfeiture, as the maker had? His contract is to pay each instalment as it becomes due, if the maker does not; but he has no opportunity of paying the first and saving the forfeiture. [PARKE, B. Nor has the indorser of a bill ever any opportunity of paying by the acceptor.] But there he knows what he has to pay: here there is a different contract as to the maker and the indorser. [LORD ABINGER, C. B. No: the indorser promises that the maker shall pay the first instalment, or, if he does not, that he shall pay the whole. PARKE, B. He is responsible for the maker's performing the whole of his contract.] The accelerated payment of the second instalment is in the nature of a penalty, for which subsequent parties cannot be liable. The liability of the indorser ought not to be made to depend upon a contingency arising upon the act of the maker: it is of the essence of such an instrument that every party to it shall know what amount he is to provide for.

Hance, contra, was not called upon.

LORD ABINGER, C. B. Suppose the case of a note payable ten days after sight: there the subsequent parties do not know when they are to be called upon. I think there is no ground for saying the defendant is not liable.

PARKE, B. Now to hold that actions could not be maintained upon such notes as this would be to impugn all the established practice. Almost every note payable by instalments has such a condition. It is not a contingency: it depends on the act of the maker himself; and, on his default, it becomes a promissory note for the whole amount. The point was in effect determined in *Oridge v. Sherborne*.¹

GURNEY, B., and ROLFE, B., concurred. *Judgment for the plaintiff*.²

¹ 11 M. & W. 374.

² *Hogg v. Marsh*, 5 Up. Can. Q. B. 319; *Heard v. Dubuque Bank*, 8 Nebr. 10; *Kirk v. Dodge Ins. Co.*, 39 Wis. 138, *accord*. — ED.

MILLER v. BIDDLE AND ANOTHER.

IN THE EXCHEQUER, NOV. 16, 1865.

[Reported in 13 Law Times Reporter, 334.]

THIS was an action brought in the Mayor's Court, London, upon a promissory note, and was tried before the Recorder.

The facts of the case were as follows :—

The note made by the defendants was in the following form :—

“£260.

LONDON, 22d of February, 1865.

“We jointly and severally promise to pay to Henry Miller, Esq., the sum of £260 by the following instalments : namely, £130 on the 22d of May, 1865, and the sum of £130 on the 22d day of August, 1865. In default of payment of the first instalment, the whole amount payable under this note to become due and payable.

“C. MADDER.

“W. BIDDLE.”

The first instalment of £130 was not paid upon the 22d of May, and thereupon a garnishee summons was issued on the 23d of May against the Temple Bar Branch of the Union Bank of London, where Biddle kept an account for the whole sum of £260. The defendants appeared, and the attachment was dissolved upon the 24th of June. Upon the 25th of May, the defendant Madder paid the sum of £130 as the first instalment upon the note, for which the plaintiff accordingly gave him credit in his particulars.

Upon these facts appearing at the trial, it was contended upon the part of the defendants that the note in question was within the Statute 3 & 4 Anne, c. 9, and that the defendants were therefore entitled to three days' grace for the payment of the first instalment. A verdict was thereupon directed for the defendants, leave being reserved to the plaintiff to move to set the verdict aside and have it entered for himself for the sum of £130 and interest, upon the ground that no days of grace were allowable on the instalments of the promissory note sued on, the same being a non-negotiable instrument.

A rule *nisi* having been obtained accordingly,

Warton showed cause against the rule. The statute of Anne has always received a liberal construction. The omission of the words, “or order” or “or bearer,” and the fact that the note was payable by instalments, makes no difference as to its negotiability. The defendants were entitled to the days of grace for the payment of each instalment ; and even if not for the first instalment, then for the payment of the whole becoming due earlier by default. He cited Smith

v. Kendall,¹ *Oridge v. Sherborne*,² *Carlton v. Kenealy*, *Rawlinson v. Stone*, *Bentley v. Northhouse*,³ *Milne v. Graham*,³ *Hill v. Lewis*,⁴ *Brown v. Harraden*; *Byles on Bills*, 191, n.

Keane, Q. C., and *Philbrick* supported the rule. An instrument by which, at a certain date, in one event a sum of £130 becomes payable, and in another a sum of £260, cannot be a negotiable instrument within the statute of Anne, since a promissory note must be an absolute promise; and the payment of the larger sum was enforceable only at the option of the holder. They cited *Carlos v. Fancourt*.⁴

Cur. adv. vult.

POLLOCK, C. B., now delivered judgment. This was an action in the Mayor's Court, tried before the Recorder, upon a promissory note not made payable to "order" or "bearer," and payable by instalments, with a condition that if any instalment were not duly paid the whole sum should become due immediately. Leave was reserved to move to set aside the verdict, on the ground that the days of grace were not allowable on such an instrument. The court granted a rule. It turns out that there is a case of *Carlton v. Kenealy*, which decides the express point; namely, that the whole sum becoming due on default in payment of one instalment is no objection to the negotiability of the note. A previous case, *Oridge v. Sherborne*, had decided that a note payable by instalments was an assignable instrument within the statute of Anne, and that the maker of such a note is entitled to the days of grace. The majority of the court are of opinion that the case of *Carlton v. Kenealy* concludes this case, and therefore that the rule must be discharged. Had I decided now as a judge at Nisi Prius, or if my decision would have the effect of a judgment, I should consider the case of *Carlton v. Kenealy* binding on me also; but, as it is not so, I think it my duty to dissent from the opinion of the majority of the court, in order to give to the plaintiffs an opportunity of appealing. I am of opinion that the statute of Anne was intended to apply only to such instruments as are properly negotiable, not to mere agreements to pay to A.⁵ There is a great difference between holding that a note is a negotiable instrument, notwithstanding it is payable by instalments, and holding that it is a negotiable instrument when it contains a stipulation by which the whole becomes immediately due

¹ 6 T. R. 123.

² 11 M. & W. 374.

³ M. & M. 36.

⁴ 5 T. R. 482.

⁵ "Lord Kenyon, C. J., said: 'If this were *res integra*, and there were no decision upon the subject, there would be a great deal of weight in the defendant's objection; but it was decided in a case in Lord Raymond's time (*Burchell v. Slocock*, 2 Ld. Raym. 1545), on demurrer, that a note payable to B., without adding 'or to his order' or 'to bearer,' was a legal note within the Act of Parliament. It is also said in *Marius* that a note may be made payable either to A. or bearer, A. or order,

on default in payment of one instalment. In *Carlton v. Kenealy*, the court thought that *Oridge v. Sherborne* concluded them. I think that was not the case, though their decision is none the less binding than if *Oridge v. Sherborne* had turned on the same point. If this were *res integra*, I should be of opinion that this instrument was not within the statute. The custom of merchants has nothing to do with any but negotiable instruments, and I feel confident that, if the question could come to be decided with respect to a bill of exchange, there would be found to be no custom of merchants in the case of a bill of exchange with such a stipulation as that contained in this note, for I think no such bill of exchange ever existed, or was known among merchants as a negotiable instrument. Then, as the statute of Anne was intended to give to promissory notes the advantages of bills, and to render the custom of merchants applicable to them, if there be no such custom as to a bill, there could be none as to a note. I should not dissent if the effect of that dissent would be a judgment contrary to what has already been decided in this court, but as it will not so operate, but only give to the plaintiffs the opportunity of appealing, I think I am right in dissenting.

Rule discharged.

or to A. only. In addition to these authorities, I have made inquiries among different merchants respecting the practice in allowing the three days' grace, the result of which is that the Bank of England and the merchants in London allow the three days' grace on notes like the present. The opinion of merchants, indeed, would not govern this court in a question of law; but I am glad to find that the practice of the commercial world coincides with the decision of a court of law. Therefore I think that it would be dangerous now to shake that practice, which is warranted by a solemn decision of this court, by any speculative reasoning upon the subject." *Smith v. Kendall*, 6 T. R. 124.

Burchell v. Slocock, referred to by Lord Kenyon, was decided in 1728, and was followed in 1736 by *Moor v. Paine*, C. T. Hard. 28; but, in *Chamberlyn v. De la Rive*, 2 Wils. 353, decided in 1767, and in *Dawkes v. Deloraine*, 3 Wils. 207, decided in 1771, the court declined to pass upon the point whether negotiable words were essential to the validity of a bill. The authority of *Smith v. Kendall* has, however, been generally recognized. *Bishop v. Chambers*, 1 Hud. & B. 433; *Kendall v. Galvin*, 15 Me. 131; *Bates v. Butler*, 46 Me. 387; *Duncan v. M'd. Sav. Inst.*, 10 G. & J. 299; *Wells v. Brigham*, 6 Cush. 6; *Downing v. Backenstoës*, 3 Cai. 137; *Goshen Co. v. Hurtin*, 9 Johns. 217; *Dutchess Co. v. Davis*, 14 Johns. 238; *Kimball v. Huntington*, 10 Wend. 675; *Coursin v. Ledlie*, 31 Pa. 506; *Averett v. Booker*, 15 Gra'tt. 167.

But see *contra*, *Backus v. Danforth*, 10 Conn. 297; *Bristol v. Warner*, 19 Conn. 7.
— Ed.

PHILADELPHIA BANK v. NEWKIRK.

IN THE DISTRICT COURT OF PHILADELPHIA, DEC. 19, 1840.

[Reported in 2 Miles, 442.]

THIS was an action brought by the Philadelphia Bank against Garret Newkirk and Stephen S. Newkirk, copartners in trade, under the firm of G. Newkirk & Son, at September term, 1840, No. 1133. The plaintiffs filed the following copy of a promissory note, on which the suit was brought:—

“\$2,111.98.

PHILADELPHIA, March 13, 1839.

“Twelve months after date, we promise to pay to the order of Heberton & Hibler twenty-one hundred and eleven dollars ninety-eight cents, without defalcation, for value received; payable at the Bank of the State of Missouri at St. Louis (current rate of exchange to be added).

“No. 1009.

(Signed)

BAIRD & FARRELL.

(Indorsed) “HEBERTON & HIBLER.

“G. NEWKIRK & SON.”

The defendants filed the following affidavit of defence:—

“Garret Newkirk, a defendant in the above case, being duly sworn, deposes and says he has good and sufficient defence to the above action. That the note on which the above suit is brought was sent by the Philadelphia Bank for collection to the Bank of the State of Missouri, which institution had ordered that all bills or drafts deposited in its hands for collection would be required to be paid in specie or its own notes. Notice was given to the plaintiffs of this order, and they agreed to withdraw the note from the Bank of the State of Missouri, and deposit it in another institution which received in payment the currency of the place, with the difference of exchange added; notwithstanding the note was suffered to remain in the Bank of the State of Missouri.

“At maturity of the note, the currency of the place, with exchange added, was tendered in payment, and refused. The neglect therefore of the plaintiffs to perform their stipulation was the cause of the non-payment of the note.

“Further, the plaintiffs have no right of action against the defendants as indorsers, the note not being a negotiable instrument, as the sum for which it is drawn is not clearly expressed in the body of it; but it is uncertain and contingent, it being stipulated in the body of the note that the current rate of exchange is to be added. And

further that payment in part has been made to the plaintiffs on said note, for which there appears no credit on the record."

The plaintiffs obtained this rule to show cause.

T. L. Smith, for plaintiff.

Dallas, for defendant.

Per Curiam. One objection is stated in the affidavit of defence, which is a sufficient reason why judgment should be refused. The plaintiffs sue on this as a promissory note. Now, to constitute a promissory note, the instrument on its face must be for the payment of a sum certain, not susceptible of contingent or indefinite additions, nor subject to indefinite or contingent deductions. In this instance, the "current rate of exchange to be added" is clearly indefinite. See 2 Stark. 375; 4 Ba. & Ad. 619; 4 B. Moore, 471.

*Rule discharged.*¹

SPERRY v. HERR.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1871.

[Reported in 32 Iowa Reports, 184.]

ACTION upon two promissory notes, each in the following form:—

"\$100.

KNOXVILLE, Iowa, Sept. 8, 1869.

"One year after date, for value received, I promise to pay A. S. Jones & Co., or bearer, the sum of \$100, with ten per cent interest until paid. If not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor.

"JOSEPH HERR."

Plaintiff is the holder of these instruments. Defence, fraud in procuring their execution, want of consideration, &c., and that the notes were not stamped when executed and delivered to the payees.²

Upon a trial to the court without a jury judgment was rendered for

¹ Russell v. Russell, 1 McArth. 263; Lowe v. Bliss, 24 Ill. 168; Hill v. Todd, 29 Ill. 101 (*semble*); Clauser v. Stone, 29 Ill. 114 (*semble*); Read v. McNulty, 12 Rich. 445; Palmer v. Fahnestock, 9 Up. Can. C. P. 172; Saxton v. Stevenson, 23 Up. Can. C. P. 508; Cazet v. Kirk, 4 All. (N. B.) 543; Nash v. Gibbon, 4 All. (N. B.) 479, *accord*.

Bradley v. Lill, 4 Biss. 473; Smith v. Kendall, 9 Mich. 241; Johnson v. Frisbie, 15 Mich. 286; Leggett v. Jones, 10 Wis. 34 (*semble*), *contra*.

See Pollard v. Herries, 3 B. & P. 335; Grutacap v. Woulmise, 2 McL. 581; Price v. Teal, 4 McL. 201.—Ed.

² So much of the case as relates to the want of a stamp is omitted.—Ed.

the amount of the notes with interest, but no recovery was had upon the agreement to pay collection and attorney fees. Defendant appeals.

Atherton & Anderson, for the appellant.

Stone, Ayers, & Curtis, for the appellee.

BECK, J. The question raised by appellant relates to the sufficiency of the instruments sued upon as promissory notes, and the defence pleaded, that they were not stamped by defendant. If the instruments are non-negotiable, the facts found by the court are sufficient to defeat recovery in this action; if negotiable, the judgment of the district court, so far as the defence of fraud, want of consideration, &c., are concerned, must be sustained. We are required, therefore, to determine whether the instruments are promissory notes. It is claimed that they are not, because they are not for the payment of a certain sum of money; the agreement obligating the maker to pay collection and attorney fees, it is insisted, renders the amount payable uncertain, and thereby destroys their character as negotiable paper.

The rule that to constitute a negotiable promissory note there must be entire certainty and precision as to the amount of money to be paid, is fully admitted, and understood to be inflexible. But, in our opinion, the instruments which are the foundation of this suit are, within the meaning of this rule, for the payment of a certain and precise sum, and are, therefore, to be considered promissory notes.

The sums payable by the terms of the notes are fixed and certain; they are subject to no increase or diminution. When they matured, no inquiry was necessary to be made as to facts not apparent on the face of the notes, in order to fix the amount due; recovery could have been had upon the notes themselves, without other evidence. The agreement for the payment of attorney fees in no sense increased the amount of money which was payable when the notes fell due, and we are unable to see that it rendered that amount uncertain in the least degree. It simply imposed an additional liability in case suit should be brought, and such liability did not become absolute until an action was instituted. This agreement relates rather to the remedy upon the note, if a legal remedy be pursued, to enforce its collection than to the sum which the maker is bound to pay. It is not different in its character from a *cognovit*, which, when attached to promissory notes, does not destroy their negotiability. In our opinion, therefore, the court was correct in holding that the instruments sued on are negotiable, and not within the operation of the rule above stated. This conclusion is, we believe, supported by prior decisions of this court. *Jewett v. Lyon*,¹ *Knipper v. Chase*,² *Green v. Austin*.³

¹ 3 Greene, 577.

² 7 Iowa, 147.

³ 7 Iowa, 522.

Many authorities hold that an agreement incorporated in the body of a note binding the maker to pay, in addition to the amount named, exchange thereon, does not, under the rule just considered, destroy the negotiable character of the instrument. *Johnson v. Frisbie*,¹ *Smith v. Kendall*,² *Leggett v. Jones*,³ *Grutacap v. Woullnise*.⁴

Under the principles of these decisions, there is no difficulty in holding the paper in question to be negotiable. The exchange provided for by the notes in these cases may be considered, however, as a part of the sum due the amount to be paid. But in the case at bar, as we have seen, the attorney's fees are not part of the sums due on the notes, but is an amount for which the maker may become liable when a legal remedy is enforced against him. There are other cases, probably equal in number and authority to those last cited, holding a contrary doctrine. See 1 *Parsons on Bills and Notes*, 38; *Lowe v. Bliss*,⁵ *Read v. McNulty*.⁶

Without weighing these conflicting authorities, we are of the opinion that the judgment of the District Court ought to be affirmed upon the ground first stated. *Affirmed*.⁷

¹ 15 Mich. 286.

² 9 Mich. 241.

³ 10 Wis. 35.

⁴ 2 McLean, 581.

⁵ 24 Ill. 168.

⁶ 12 Rich. (Law) 445.

⁷ *Howenstein v. Barnes*, 9 C. L. J. 48; *Farmers' Bank v. Rasmussen*, 1 *Dakotah*, 60 (*semble*); *Nickerson v. Sheldon*, 33 Ill. 372; *Stoneman v. Pyle*, 35 Ind. 103; *Hubbard v. Harrison*, 38 Ind. 323; *Walker v. Woollen*, 54 Ind. 164; *Churchman v. Martin*, 54 Ind. 380; *Brown v. Barber*, 59 Ind. 533; *Seaton v. Scovill*, 18 Kas. 433; *Gaar v. Louisville Co.*, 11 Bush, 180; *Dietrich v. Bayhi*, 23 La. An. 767; *Heard v. DuBuque Bank*, 8 Nebr. 10; *Kemp v. Klaus*, 8 Nebr. 24, *accord*.

Farquhar v. Fidelity Co., 18 Alb. L. J. 330; *First Nat. Bank v. Gay*, 63 Mo. 33; *Samstag v. Conly*, 64 Mo. 476; *Woods v. North*, 84 Pa. 407, *contra*.

Similarly in *Houghton v. Morrison*, 29 Ill. 244; *Gaar v. Louisville Co.*, 11 Bush, 180; *Towne v. Rice*, 122 Mass. 67, as well as in *Sperry v. Horr*, *supra*, instruments were held to be promissory notes, notwithstanding the insertion of a stipulation "to pay ten per cent interest after maturity till paid." And in *Dinsmore v. Duncan*, 57 N. Y. 573, the option reserved by the maker to pay interest at 7 3-10 per cent in lawful money, or at 6 per cent in coin, was held not to impair the validity of the instrument as a negotiable note.

Conf. Richer v. Voyer, L. R. 5 P. C. 461, 475-477; *Easter v. Bond*, 79 Ill. 325. -- ED.

The Payment must be certain — (continued).

(b) IN ^{Time} ~~Amount~~.

COLEHAN v. COOKE.

IN THE COMMON PLEAS, FEBRUARY 10, 1743.

[*Reported in Willes, 393.*]

THE following opinion of the court was delivered by WILLES, LD. C. J. Motion in arrest of judgment. The first count is on a promissory note dated 27th of May, 1732, whereby the defendant promised to pay to Henry Delany, or order, one hundred and fifty guineas ten days after the death of his father, John Cooke, for value received; which note, after the death of the father (which is laid to be the 2d of April, 1741), was duly indorsed by Delany to the plaintiff. The second count is on a promissory note dated the 15th of July, 1732, whereby the defendant promised to pay to Henry Delany, or order, six weeks after the death of his father, fifty guineas, for value received; the like indorsement laid after the death of the father, as before. The third count is for money had and received, &c., £250; but this is out of the case. The damage is laid at £300, and a general verdict for the plaintiff on both notes.

It was insisted ¹ on for the defendant in arrest of judgment that these notes are not within the Statute 3 & 4 Anne, c. 9; and, if not, that they are not indorsable or assignable, and consequently that the plaintiff, who brings this action as indorsee, cannot recover at law. To show that these notes are not within the statute, a great many things were said on the arguing of the case, and a great many cases and authorities cited both out of the common and civil law books. But I think that all the objections that were made may be reduced to these two general positions:—

First, that the Act of Parliament only intended to put promissory notes on the same foot as bills of exchange; and that therefore, if bills of exchange drawn in this manner would not be good, and consequently not assignable, it follows that notes drawn in this manner are not made indorsable or assignable by the statute.

Secondly, that the act was made for the advancement of trade and commerce, and consequently was intended to extend only to such notes as are in their nature negotiable, and that these notes are not so.

Before I consider these objections, I will state the words of the Act of Parliament on which the question must depend, 3 & 4 Anne, c. 9, entitled, “An act for giving like remedy on promissory notes as is

¹ This case was several times argued.

now used on bills of exchange, and for the better payment of inland bills of exchange." Whereas it hath been held that notes in writing signed by the party who makes the same, whereby such person promises to pay to any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchants, and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom, maintain any action on such note against the person who first drew and signed the same: therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted that all notes in writing which shall, after, &c., be made and signed by any person or persons, &c., whereby such person or persons do or shall promise to pay to any other person or persons, &c., his, her, or their order, or unto the bearer, any sum of money mentioned in such note, shall be taken, and construed by virtue thereof, due and payable to any such person or persons, &c., to whom the same is made payable, and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and that the person or persons, &c., to whom the sum of money is made payable by such note shall and may maintain an action for the same in such manner as he, she, or they may do upon any inland bill of exchange, &c.; and that the person or persons, &c., to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such money either against the person or persons who signed such note, or against any of the persons who indorsed the same, in like manner as in case of inland bills of exchange. The title of the act seems to refer to bills of exchange; and they are likewise referred to in the preamble, and the remedy is to be the same. But in the description of the notes which are to be made assignable there is no reference to bills of exchange, but the words are very general; and I never understood that the plain words of an enacting clause are to be restrained by the title or preamble of an act. It has, indeed, been often said, and I think very rightly, that if the words of an Act of Parliament be doubtful, it may be proper to have recourse to the preamble to find out the meaning of the legislature; but where the words of the enacting part are plain and express, I do not think that they ought to be restrained by the preamble: for the preamble may only recite some particular mischiefs which have happened; but the enacting clause may not only be calculated to prevent those mischiefs, but others also of a like nature. Now the words of the enacting part of this act are plain and clear and

very general, and, in order to bring a note within the description of that clause, it is only necessary,

First, that the note should be in writing ;

Secondly, that it should be made and signed by the person promising to pay ; and,

Thirdly, that there be an express promise to pay to another, or his order, or bearer. But, as to the time of payment, the act is silent ; nor is there any particular form prescribed.

And, therefore, as to the first objection, that if a bill of exchange had been drawn in this manner it would not have been good. Supposing it to be true, I do not think that it follows that these promissory notes may not be within the general words of the statute, if they answer all the descriptions therein contained. However, for argument's sake, I will suppose that this consequence would hold ; but we do not think that a bill of exchange drawn in this manner would be bad. Upon this head, it would be but misspending time to run over all the passages which have been cited out of the civil-law books in relation to bills of exchange, because I put a question to the counsel which will, I think, determine this point : whether there is any limited time mentioned in any of the books beyond which, if bills of exchange are made payable, they are not good ; and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. But if a bill of exchange be made payable at never so distant a day, if it be a day that must come, it is no objection to the bill. There is but one passage in the books wherein any notion to the contrary is so much as hinted at ; and that is in Scacchia de Commerciis, where it is said that it had been *formerly* an objection against a bill of exchange, as contrary to the nature of it, that it was made payable at the end of seven months ; but by his making use of the word "formerly," it is plain that in his opinion the law was then held to be otherwise. If, therefore, the distance of time would not have made a bill of exchange bad if drawn in this manner, since it is drawn at a time which must come, the only other objection that was made on this head was that in all bills of exchange there must be a *par pro pari*, which there cannot be in this case, because the value cannot be ascertained. But I shall show plainly that the value may be ascertained, when I come to the other objection that these are not negotiable notes.

Secondly, having answered the objections against these notes, considering them on the same foot as bills of exchange, I come now to the second objection, arising from the words and intent of the statute. And, first, I think that they are plainly within the words. They are made in writing ; they are signed by the person promising to pay ; and there is an express promise to pay to another, or his order ; and,

as no time of payment is mentioned in the statute, the distance of time is no objection within the words of the act.

Let us see, therefore, in the next place, whether any objection arises against them from the design and intent of the act; though I think it would be pretty hard to construe a note to be not within the intent of an act when it is manifestly within the words of it, and the words of the act are plain and express. When the words of an act are doubtful and uncertain, it is proper to inquire what was the intent of the legislature. But it is very dangerous for judges to launch out too far in searching into the intent of the legislature, when they have expressed themselves in plain and clear words. However, we think that these notes are within the intent as well as the words of the act. And, to show that they are so, I will here take notice of all the cases which were cited to the contrary, and will show that they all stand on a different foot, and are plainly distinguishable from the present. For they are all of them cases where either the fund out of which the payment was to be made is uncertain, or the time of payment is uncertain, and might or might not ever happen: whereas in the present case there is no pretence that the fund is uncertain, and the time of payment must come, because the father, after whose death they are made payable, must die one time or other. The case of *Pearson v. Garrett*¹ was thus: the defendant gave a note to pay sixty guineas when he married B., and judgment was given for the defendant, because it was uncertain whether he would ever marry her or not; so the time of payment might never come. In the case of *Jocelyn v. Le Serre*, the bill was drawn on Jocelyn to pay so much every month out of his growing subsistence. How long that would last no one could tell, or whether it would be sufficient for that purpose; and therefore the bill was holden not to be good, because the fund was uncertain. In the case of *Smith v. Boheme*, the promise in the note was to pay £70, or surrender a person therein named; if, therefore, he surrendered the person, there was no promise to pay any thing, and therefore the note was uncertain and not negotiable. In the case of *Appleby v. Biddolph*, a promise to pay if his brother did not pay by such a time, held not to be within the statute, because it was uncertain whether the drawer of the note would ever be liable to pay or not. In the case of *Jenney v. Herle*, a promise to pay such a sum out of the income of the Devonshire Mines, held not a promise within the statute, because it was uncertain whether the fund would be sufficient to pay it. So, in the case of *Barnsley v. Baldwyn*, the promise was, as in the case of *Pearson v. Garrett*, to pay such a sum on marriage, and held not to be within the statute for the same reason.

¹ 4 Mod. 242, and Comb. 227.

And as these notes are plainly not within the intent of the statute, because not negotiable *ab initio*, so when the words themselves come to be considered they are not within the words of it, because the statute only extends to such notes where there is an absolute promise to pay, and not a promise depending on a contingency, and where the money at the time of the giving of the note becomes due and payable by virtue thereof (so are the words of the statute), and not where it becomes due and payable by virtue of a subsequent contingency which may perhaps never happen, and then the money will never become payable at all. And it can never be said that there is a promise to pay money, or that money becomes due and payable by virtue of a note, when, unless such subsequent contingency happen, the drawer of the note does not promise to pay any thing at all.

But the present notes, and those cases where such notes have been holden to be within the statute, do not depend on any such contingency, but there is a certain promise to pay at the time of the giving of the notes, and the money by virtue thereof will certainly become due and payable one time or other, though it is uncertain when that time will come. The bills therefore of exchange, commonly called *billæ nundinales*, were always holden to be good, because though these fairs were not always holden at a certain time, yet it was certain that they would be held. The case of *Andrews v. Franklyn* depends on the same reason; for there the note was to pay such a sum two months after such a ship was paid off, and held good because the ship would certainly be paid off one time or other. The case of *Lewis v. Ord*¹ was exactly the like case, and determined on the same reason. As to the objection that these are not negotiable notes, because the value of them cannot be ascertained, the argument is not founded on fact, because the value of a life when the age of a person is known is as well settled as can be; and there are many printed books in which these calculations are made. But, if it were otherwise, the life of a man may be insured, and by that the value will be ascertained. And the same answer will serve to the objection which I before mentioned against such bills of exchange.

There was another objection taken, that the drawer might have died before his father, and then these notes would have been of no value; but there is plainly nothing in this objection, for the same may be said of any note payable at a distant time, that the drawer may die worth nothing before the note becomes payable.

We do not think that the averment of the death of the father before the indorsement makes any alteration, because we are of opinion that

¹ *Cunningh. Bills of Exchange*, 113.

if the notes were not within the statute *ab initio* they shall not be made so by any subsequent contingency. But, for the reasons aforesaid, we are of opinion (and so was the Lord Chief Baron Parker) that the plaintiff is entitled to his judgment;¹ and therefore the rule for arresting the judgment must be discharged.²

WALKER, EXECUTOR OF WALKER, v. ROBERTS.

AT NISI PRIUS, CORAM CRESSWELL, J., SPRING CIRCUIT, 1842.

[Reported in *Carrington & Marshman*, 590.]

ASSUMPSIT by the plaintiff, as the executor of the payee, against the defendant as maker of a promissory note, dated February, 1831, for £19 19s. 11*d.*, with interest, on demand, six months after notice.

Plea: *non assumpsit*.

The note, which was proved to have been written by the defendant's wife, by his authority, was in the following form:—

“FEBRUARY, 1831.

“William Walker lent to James Roberts £19 19s. 11*d.*, to receive five *per sent* for the same £19 19s. 11*d.*; to pay on demand to the said William Walker, giving James Roberts six months' notice for the same.

“Witness my hand,

“JAMES X MARY ROBERTS.”

It appeared that the interest had been paid to February, 1838, and that there had been six months' notice given, and a demand made after the six months' notice had expired.

J. G. Phillimore, for the defendant. I submit that this is an agreement to pay money on certain conditions, and is not a promissory note; and that it ought to be stamped as an agreement, and not as a promissory note, as it is.

CRESSWELL, J. I think it is a promissory note.

*Verdict for the plaintiff.*³

¹ This judgment was afterwards affirmed in the Court of King's Bench on a writ of error. 2 Str. 1217.

² *Roffey v. Greenwell*, 10 A. & E. 222; *Conn v. Thornton*, 46 Ala. 587; *Bristol v. Warner*, 19 Conn. 7; *Mortee v. Edwards*, 20 La. An. 236, *accord*.

See *Richards v. Richards*, 2 B. & Ad. 454. — ED.

³ *Gaytes v. Hibbard*, 5 Biss. 99 (*semble*); *Goshen Co. v. Hurtin*, 9 Johns. 217 (*semble*); *Dutchess Co. v. Davis*, 14 Johns. 238 (*semble*); *Washington Ins. Co. v. Miller*, 26 Vt. 77, *accord*.

Union Co. v. Jenkins, 1 Cai. 381, *contra*. — ED.

ALEXANDER v. THOMAS.

IN THE QUEEN'S BENCH, JANUARY 23, 1851.

[Reported in 16 Queen's Bench Reports, 333.]

ASSUMPSIT. The first count stated that defendant, on 19th November, 1839, made his bill of exchange in writing, and directed the same to one Shadwell, and thereby requested Shadwell, ninety days after sight, or when realized, of that his, the defendant's first bill of exchange, &c., to pay to the plaintiff, or order, £1256 13s. 4d., value received. Averment that the said bill was presented to Shadwell, and that he refused to accept, although the period of ninety days after presentment and sight thereof by him had elapsed, &c.

Plea: that defendant did not make his bill of exchange *modo et forma*. Issue thereon.

On the trial before Lord Campbell, C. J., at the London sittings after last Easter term, the plaintiff had a verdict on this issue.

Knowles, in last Trinity term, obtained a rule *nisi* to arrest the judgment, on the ground that the bill of exchange set out in the declaration was payable on a contingency, and that the declaration was therefore bad.

Watson and *M. Smith* now showed cause. The meaning of the bill of exchange as described in the declaration is that it is to be paid ninety days after sight at all events, or sooner if the drawee is in funds before that period. [LORD CAMPBELL, C. J. Even on this construction it would be uncertain whether it would be payable at all within the ninety days, and, if payable within that time, on what particular day it would be so payable.] Although a bill payable on a contingency that may never happen, as out of money to arise on the sale of defendant's reversion, is bad, *Carlos v. Fancourt*;¹ yet if the contingency, on which the bill is payable, must happen, as, for instance, six weeks after the death of the defendant's father, the bill is good. *Cooke v. Colehan*. A bill payable so many days after sight is good, though it is uncertain when sight will be had of the bill. If the language of this bill had been "ninety days after sight and when realized," the objection would be good; but the alternative "or" saves the bill, for the period of payment, viz., the end of ninety days, must arrive.

Atherton, contra. Unless the instrument declared on be a good bill, the declaration is bad, for no consideration is stated for the defendant's promise. Treating the instrument, therefore, as a bill, and giving a

¹ 5 T. R. 482.

meaning to all the words of it, if a meaning can be given to them, is this instrument a good bill of exchange according to the custom of merchants? The words "or when realized" are not insensible: the obvious meaning of them is "when you are in funds for the purpose." This event may never happen; and so it is uncertain whether the bill will ever be payable, for the words are to be read "ninety days after sight, if then in funds, if not, as soon as you are in funds afterwards." If, however, it is to be taken that the bill was payable absolutely ninety days after sight, because the alternative words are insensible, this will not help the declaration, for the bill is not so described. If an instrument is payable on the alternative contingency of two events, one of which may never happen, the instrument is as uncertain as if payable on one event which may never happen, for the drawee would have his option.

LORD CAMPBELL, C. J. I am of opinion that judgment must be arrested, unless this is a good bill of exchange according to the custom of merchants. If we could reject the words "or when realized" as insensible, the bill would certainly be unexceptionable. But a reasonable meaning has already been ascribed to them, viz., "or when you are in funds for the purpose." I do not see why this alternative is to be taken as limited to the term before the expiration of the ninety days rather than after. I should say the meaning is that the bill is to be paid at the end of ninety days, if the drawee should be then in funds; if not, that it shall be payable afterwards. Even, however, if the other is the right meaning, namely, that the bill is payable sooner if the drawee should be sooner in funds, and, if not, at the end of ninety days at all events, I think this would not be a good bill; for the holder would have to watch and ascertain the precise time when the bill should become payable, and, if he failed in doing this and in duly presenting it, the drawer would be discharged. I am of opinion that this is not a good bill of exchange, drawn according to the custom of merchants, so as to relieve the plaintiff from the necessity of stating a consideration for it.

PATTESON, COLERIDGE, and ERLE, JJ., concurred.

*Rule absolute.*¹

¹ Brooks v. Hargreaves, 21 Mich. 254.

(" \$583.00

" DETROIT, MICH., Dec. 24, 1867.

"One year after date, for value received, we promise to pay to Joseph Smith, or bearer, five hundred and eighty-three dollars, with interest,—this to be paid when any dividends shall be declared on such shares as Joseph Smith has been holding heretofore in the Agricultural and Broom-handle Manufacturing Company of Trenton, Mich.

(Signed)

GEO. HARGREAVES & Bro.") accord.

Nunez v. Dautel, 19 Wall. 560. The following instrument — “Due J. Dautel, or order, \$1619.66. . . . This we will pay as soon as the crop can be sold or the money raised from any other source,” &c. — was held not to be a note, but to show an obligation to pay in a reasonable time, though the contingencies mentioned might never happen.

Conf. *Jones v. Eisler*, 3 Kans. 184; *Palmer v. Hummer*, 10 Kans. 464; *Gårdner v. Barger*, 4 Heisk. 668. — ED.

ARCHIBALD MACARTHUR-STEWART v. WILLIAM
FULLARTON AND OTHERS.

· IN THE COURT OF SESSION, SCOTLAND, JAN. 29, 1782.

[*Reported in Morson's Dictionary of Decisions, 1408.*]

ON Aug. 1, 1743, John Stewart-Murray, of Blackbarony, granted to Mrs. Mary Stewart, his sister, a bill of the following tenor :—

“BROTHER,— Pay to me, at the first term of Whitsunday or Martinmas after your decease, £140 sterling money, value received from your sister, Mary Stewart.

“TO JOHN MURRAY, of Blackbarony, Esq.

“Accepts, J. St. MURRAY.”

Mr. Murray survived the date of this bill thirty-seven years; having made an entail of his whole estate, real and personal, in favor, first of his sister, and next of Mr. Macarthur-Stewart. Upon the death of that lady without issue, her executors demanded from the latter, then succeeding to the whole movables, which had belonged to her brother, and were in her possession, deduction of the debt due to herself by the above bill.

Pleaded for the heir. A bill payable at a term posterior to the death of the grantor is truly a novelty; and in the present case that event did not happen for thirty-seven years after its date. As a document of debt, the bill in question must appear in a light equally extraordinary and dangerous. Should it be sustained to that effect, many new opportunities would arise of committing forgery with impunity. But perhaps it ought rather to be considered as constituting a legacy in a manner not authorized by law.

Answered. As this bill bears value received, so there is no evidence of its having been intended to constitute a legacy. It is therefore to be understood as a voucher of debt; to which it is no sufficient objection that the reason of postponing payment till the death of the grantor cannot be clearly shown, especially as the transaction occurred between persons so nearly related.

The Court did not view the bill as constituting a legacy. They thought, however, that the right which it contained was of so anomalous a kind as not to be the proper subject of a bill, and therefore adhered to the Lord Ordinary's interlocutor, “sustaining the objections to the bill.”

HERRICK v. BENNETT.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1811.

[Reported in 8 Johnson, 374.]

THIS was an action of assumpsit on a promissory note. The first count of the plaintiff's declaration stated that the defendant, on May 25, 1809, at, &c., made his certain promissory note in writing, subscribed, &c., and then and there delivered the same to the plaintiff, by which said note the defendant promised to pay to the plaintiff, or order, \$112.53. By reason whereof, &c. There was a demurrer to this count of the declaration, which was submitted to the court without argument.

Per Curiam. It is to be presumed that the plaintiff has stated the note, in his declaration, according to the terms of it, and that is sufficient. The conclusion of the law is, that where no time of payment is specified in a note, it is payable immediately. The first count, then, shows a cause of action, and the plaintiff is entitled to judgment.

*Judgment for the plaintiff.*¹

FRANCIS COTA v. BUSHROD BUCK.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1844.

[Reported in 7 Metcalf, 588.]

INDEBITATUS ASSUMPSIT on the common money-counts. Plea: the general issue. Trial in the Court of Common Pleas.

The plaintiff, to maintain the issue on his part, offered in evidence the following instrument:—

“NEW ASHFORD, March 13, 1840.

“For value received, I promise to pay John Pero, or bearer, five hundred and seventy dollars and fifty cents; it being for property I purchased of him in value at this date, as being payable as soon as can

¹ Whitlock v. Underwood, 2 B. & C. 157; Aldous v. Cornwell, L. R. 3 Q. B. 573; Abbot v. Douglas, 1 C. B. 491; Thorn v. Scovil, 2 Kerr, 557; Holmes v. West, 17 Cal. 623; Keyes v. Fenstermaker, 24 Cal. 329; Bacon v. Page, 1 Conn. 404; Freeman v. Ross, 15 Ga. 252; Greene v. Drebilbis, 1 Greene, 552; Kendall v. Galvin, 15 Me. 131; Porter v. Porter, 51 Me. 376; Mason v. Patton, 1 Mo. 279; Thompson v. Ketcham, 8 Johns. 189; Gaylord v. Van Loan, 15 Wend. 308; Cornell v. Moulton, 3 Den. 12; Jones v. Brown, 11 Oh. St. 601; Mich. Ins. Co. v. Leavenworth, 30 Vt. 20, accord. — ED.

be realized of the above amount for the said property I have this day purchased of said Pero, which is to be paid in the course of the season now coming.

BUSHROD BUCK."

The defendant objected that this instrument was not a negotiable note, and therefore could not be given in evidence by the plaintiff in this action, brought in his own name. The court decided that said instrument was a negotiable note, transferable by delivery; and the same was given in evidence to the jury, who returned a verdict thereon for the plaintiff. The defendant alleged exceptions to said decision.

Lauckton, for the defendant, cited *Coolidge v. Ruggles*; ¹ Story on Bills, 57-60; Chit. on Bills (Springfield ed., 1830), 41, 42, 44, 48, and notes.

Colt, for the plaintiff. The note was payable at all events during the season of 1840, and was not payable out of a particular fund. *Haus-soullier v. Hartsinck*,² *McLeod v. Snee*, *Stevens v. Blunt*,³ *Pierson v. Dunlop*.⁴ But, if the note were payable out of a particular fund, it was a fund in the defendant's power when the note was given. Such note is negotiable, though it may be otherwise in case of a bill of exchange. 1 Dane, Abr. 384; *Kyd on Bills* (Boston ed.), 50.

SHAW, C. J. The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contingency or out of a particular fund, it would not be negotiable. This note, we think, was payable by the promisor at all events, and within a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this: that the signer, for value received in the purchase of property, promised to pay Pero or bearer the sum named, as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute, and did not depend on the fund. So as to the time, whatever time may be understood as the "coming season," whether harvest time or the end of the year, it must come by mere lapse of time; and that must be the ultimate limit of the time of payment.

*Exceptions overruled.*⁵

¹ 15 Mass. 387.

² 7 T. R. 733.

³ 7 Mass. 240.

⁴ Cowp. 571.

⁵ *Conn v. Thornton*, 46 Ala. 587 ("One day after date, I promise to pay, or at my death," &c.); *Walker v. Woollen*, 4 C. L. J. 248; *Kincaid v. Higgins*, 1 Bibb, 396 ("I promise to pay, as soon as I can," &c.); *Smith v. Ellis*, 29 Me. 422 ("a note for

JOHN SMILIE v. SIMON STEVENS.

IN THE SUPREME COURT, VERMONT, AUGUST TERM, 1866.

[Reported in 39 Vermont Reports, 815.]

ASSUMPSIT to recover on a certificate of deposit payable to James Smilie, or order, "on demand, on the return of this certificate and my guarantee of his note to his brother John," &c. The first count of the declaration set forth the instrument, and averred that it had been duly assigned, and ordered to the plaintiff in words and figures as follows: "Pay to John Smilie or order," signed "James Smilie," dated Sept. 1, 1865. And the plaintiff averred that he had demanded the same of the defendant, and offered to return the said guarantee of the notes, but the defendant refused and neglected to pay the same. To this count the defendant demurred specially. The case was heard upon the demurrer at the June term, 1866, Steele, J., presiding; and the court rendered judgment that said count was insufficient, to which the plaintiff excepted.

Barker, for the plaintiff, cited to show that the instrument was negotiable. *Parsons on Notes and Bills*, Vol. I. p. 26; *Miller v. Austin*,¹ *Laughlin v. Marshall*,² *Corey v. McDougal*,³ *Kilgore v. Bulkley*,⁴ *Bank of Orleans v. Merrill*, *Welton v. Adams*,⁵ *Johnson v. Barney*,⁶ *Stevens v. Blunt*.⁷

The defendant knew the plaintiff held the certificate, and expected

\$4,096.81, payable as soon and as fast as the same may be or can be collected, on a contract this day assigned to us; and, if not so collected, to be paid in four years," &c.); *Stevens v. Blunt*, 7 Mass. 240 ("I do agree to pay to Solomon Stevens or order forty dollars, by the 20th of May, or when he completes the building, according to contract," &c.); *Henschel v. Mahler*, 3 Den. 428 (a bill payable in New York Oct. 31, or in Paris Dec. 31, 1839); *Goodloe v. Taylor*, 3 Hawks, 458 ("against the 25th of December, 1819, or when the house J. Mayfield has undertaken to build for me is completed, I promise to pay," &c.); *Ring v. Foster*, 6 Oh. 279 ("Three months after date, we promise to pay S. F. \$143.22: *provided* S. F. delivers the crop of tobacco raised by him, then S. F. is to have one-fourth of the above in hand, and, in addition thereto, \$3.50 for the part undelivered; payable one-fourth in hand, the balance in one hundred and thirty days," &c.); *Jordan v. Tate*, 19 Oh. St. 586 (a note payable on or before a future day therein named); *Ernst v. Steckman*, 74 Pa. 13 ("Twelve months after date, or before, if made out of the sale of" — a machine — "I promise," &c.); *Capron v. Capron*, 44 Vt. 410 ("I promise to pay B. D. or bearer \$75, one year from date; and, if there is not enough realized by good management in one year, to have more time to pay, in the manufacture of the plaster-bed on Stearns's land," &c.), *accord*.

See *Works v. Hershey*, 35 Iowa, 340. Conf. *Jones v. Eisler*, 3 Kans. 134; *Palmer v. Hummer*, 10 Kans. 464; *Gardner v. Barger*, 4 Heisk. 668. — ED.

¹ 13 How. 218.² 19 Ill. 390.³ 7 Ga. 84.⁴ 14 Conn. 362.⁵ 4 Cal. 87.⁶ 1 Iowa, 531.⁷ 7 Mass. 240.

to pay the amount to him, which fact we think makes him liable even if the writing is not negotiable. See *Moar v. Wright*,¹ *Bucklin v. Ward*,² *Hodges v. Eastman*;³ and he is liable though no express promise is shown.⁴

B. N. Davis, for the defendant.

I. No privity of contract is alleged between the plaintiff and defendant, and it does not appear the defendant promised to pay the certificate to the plaintiff.

In negotiable paper, the indorsement to the plaintiff raises an implied promise on the part of the defendant to pay, but the promise must be alleged, or the declaration is bad on special demurrer.

II. The instrument declared on is not a negotiable note or bill, so as to enable the assignee to sue in his own name without a special promise, and then the assignee must count on the promise and not by force of the assignment. See *Story on Promissory Notes*, p. 23, § 22, and the numerous authorities there cited; *Chitty on Bills*, 54, and authorities there cited. It is certain, unless the guarantee was returned, the certificate would not be payable by the defendant. *Collins v. Lincoln*,⁵ *Walbridge v. Harroon*,⁶ *Alexander v. Thomas*.

The opinion of the court was delivered by

PECK, J. The principal question made in this case is, whether the instrument set forth in words and figures in the declaration is a negotiable instrument, so as to enable the plaintiff to maintain an action upon it in his own name as indorser. It appears from the instrument that the consideration moved from James Smilie, Jr., to the defendant, by the deposit with the latter by the former of \$500, and is in terms "payable to his (James Smilie, Jr.) order on demand, with interest, from Feb. 15, 1864, on the return of this certificate and my guarantee of his note to his brother John Smilie, dated Feb. 15, 1864, for the sum of five hundred dollars," and is signed by the defendant.

It is a general principle of the common law that a chose in action is not assignable, even if in terms made payable to bearer or to the order of the promisee; but by the law-merchant it is otherwise in case of promissory notes and bills of exchange in terms made payable to bearer or to the order of the payee. The question is whether this instrument is a promissory note within the meaning of the law-merchant, as applicable to this question. The general rule on this subject is that a promissory note or bill of exchange must be payable absolutely, and not depend on a contingency, in order to come within the definition of a bill or promissory note so as to be negotiable. If the

¹ 1 Vt. 57.

² 7 Vt. 195.

³ 12 Vt. 358.

⁴ 36 Vt. 46.

⁵ 11 Vt. 268.

⁶ 18 Vt. 448.

contingency depends on an event which necessarily must happen, so that the only contingency or uncertainty is as to time, it does not destroy the negotiability of the instrument. So, too, if the contingency, as to the time of the payment, depends on an act to be done by the holder in reference to the instrument itself to hasten or fix the time of payment, as if a bill or note is made payable a given number of days after presentment and demand of payment, such contingency does not destroy its negotiability, as in such case the instrument imports an absolute indebtedness. The fact that the instrument in question is made payable "on the return of this certificate" is not such a contingency as affects its negotiable character. It is an act to be done with the instrument itself contemporaneous with the payment, and is no more than would be the implied duty of the holder of a negotiable note or bill in the absence of such stipulation; as it is the duty of the holder to deliver up a negotiable promissory note or bill on the payment of it by the maker, as a voucher for his security, or show a sufficient excuse for not doing so.¹

There is another contingency of a different character, — the return of the maker's guarantee of the payee's note for \$500 to his brother John Smilie. This contingency is collateral to the instrument in question, and depends on an act to be done by the payee, and on the performance of which the liability of the defendant depends. By the terms of this instrument the payee could have no remedy upon it till he had performed the condition, either literally or at least in some mode that would release the defendant from his liability on that guarantee. This the payee might never do, and the defendant might be compelled to pay the \$500 note he thus guaranteed; which payment would extinguish his liability on the paper in question. This is not a mere contingency as to the time of payment: it is a condition to be performed by the payee, and only on the substantial performance of which can any liability of the defendant, upon this instrument, arise. It is by the terms of the contract in question contingent whether the defendant would ever become liable upon it.

The authorities are numerous to show that an instrument having all the other requisites of a promissory note is not with such a condition,

¹ *Protection Ins. Co. v. Bill*, 31 Conn. 534. ("I promise to pay ——— \$1,075.50, and the same shall be paid in whole, or from time to time in part, as the same shall be required, within thirty days after demanded, or upon a notification of thirty days in any newspaper printed in Hartford," &c.); *Bellows Falls Bank v. Rutland Bank*, 40 Vt. 377, *accord*.

Patterson v. Poindexter, 6 W. & S. 227; *Charnley v. Dulles*, 8 W. & S. 353; *Lebanon Bank v. Mangan*, 28 Pa. 452, *contra*.

See *Clayton v. Gosling*, 5 B. & C. 360. — Ed.

or subject to such a contingency, negotiable. If the plaintiff could show a special promise by the defendant to pay to him as assignee or indorsee, and show the condition performed, he might recover; but the declaration contains no such allegation. The declaration is insufficient for the reasons stated, and the other objections to it need not be noticed.

The plaintiff has leave to amend under the general rule as to costs, and therefore the judgment of the County Court is reversed, *pro forma*, and case remanded.¹

JOHN B. N. STULTS *v.* MANUEL SILVA AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOV. 11, 12, 1875.

[Reported in 119 Mass. 137.]

CONTRACT against Manuel Silva and Benjamin B. Newhall. The first count alleged that Silva made a promissory note, a copy of which was annexed, payable to Newhall or order, and that Newhall, "waiving demand and notice, indorsed the same to the plaintiff," and that Newhall owed the plaintiff the amount of the note and interest thereon. The copy of the note was as follows:—

"\$2,268.00.

BOSTON, Feb. 1, 1872.

"For value received, I promise to pay to Benjamin B. Newhall, or order, \$2,268.00 in one and a half years, or sooner at the option of the mortgagor, from this date, with interest to be paid semi-annually at the rate of seven per cent per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

MANUEL SILVA.

"Secured by mortgage of real estate in Boston, Mass., stamped as required by U. S. Internal Revenue Laws, to be recorded in Suffolk Registry of Deeds.

[Indorsed.] "Waiving demand and notice. BENJAMIN B. NEWHALL."

The second count was upon another note differing only in amount from the preceding, and with a similar indorsement. Answer, a general denial. The plaintiff discontinued as to Silva, on the ground

¹ White *v.* Smith, 77 Ill. 351 ("I promise to pay to the Monticello Railroad Company, or order, the sum of \$50, to be paid in such instalments and at such times as the directors of said company may from time to time assess or require," &c.); Stillwell *v.* Craig, 58 Mo. 24, *contra*.

Conf. Washington Ins. Co. *v.* Miller, 26 Vt. 77. — Ed.

of his discharge in bankruptcy; and a trial was had against Newhall in the Superior Court, before Putnam, J., who allowed a bill of exceptions, in substance as follows:—

The plaintiff proved the signatures of Silva as maker, and Newhall as indorser, as alleged; that the notes had not been paid; that he was the holder of the notes, and paid cash for them, and called upon Newhall, when they matured, to pay them, and he did pay the interest to August, 1873, and rested the case. The defendant contended and asked the judge to rule that the notes were not negotiable, and that this action could not be maintained against him as indorser; but the judge ruled otherwise. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

L. W. Howes, for the defendant.

C. S. Lincoln, for the plaintiff. 1. The notes are negotiable. Even if it is assumed that the maker is the mortgagor, which is not a fact apparent on the face of the notes, the maker promises to pay in a time certain, or sooner, at the option of the mortgagor, that is, if he pleases. The promise to pay sooner if the maker pleases is no promise, and is absurd and meaningless. No right is reserved thereby to pay before maturity. Being meaningless, the words should be entirely disregarded.

In *Way v. Smith*,¹ there was a distinct agreement that the maker should have the right to pay the note before maturity, and that a lower rate of interest should be paid.

In *Hubbard v. Mosely*,² it was distinctly agreed that on the payment to the original payee the note should be given up to the maker. In the present case, the payment could be made only to the actual holder.

The phrase, “or sooner at the option of the mortgagor,” is rendered still more absurd and ambiguous by the word “mortgagor.” There is nothing on the notes to show who the mortgagor is. *Cota v. Buck*, *Stevens v. Blunt*,³ *Baxter v. Stewart*,⁴ *Washington County Ins. Co. v. Miller*.⁵

GRAY, C. J. Each of the instruments in suit expresses a promise to pay a certain sum of money in a year and a half from its date, “or sooner at the option of the mortgagor,” with interest at a certain rate “during said term.” The principal sum is to be paid either at the time specified or at any earlier time that the mortgagor may elect. The interest is to be computed only until the note is paid. Both the time of payment of the principal and the amount of in-

¹ 111 Mass. 523.

² 11 Gray, 170.

³ 7 Mass. 240.

⁴ 4 Sneed (Tenn.), 213.

⁵ 26 Vt. 77.

terest are uncertain, and depend upon the election of the mortgagor, who would seem, from the memorandum upon the note itself, to be the maker of the note. But, if he were a third person, it would not aid the plaintiff. In either alternative, the contract, not being a promise to pay a fixed sum of money at a definite time, lacks the essential quality of a negotiable promissory note, and cannot be sued upon as such. *Way v. Smith*,¹ *Hubbard v. Moseley*,² *Story on Notes*.³

Exceptions sustained.



JACKSON A. JORDAN v. SAMUEL TATE, SR.

IN THE SUPREME COURT, OHIO, DECEMBER TERM, 1869.

[Reported in 19 *Ohio State Reports*, 586.]

MOTION for leave to file a petition in error to reverse a judgment of the District Court of Montgomery county, affirming the judgment of the Court of Common Pleas.

BY THE COURT. The negotiable character of a promissory note is not affected by the fact that it is made payable by its terms on or before a future day therein named. Though the maker has a right to pay such note at any time after its date, yet for all purposes of negotiation it is to be regarded as a note payable solely on the day therein named.

*Motion overruled.*⁴

¹ 111 Mass. 523.

² 11 Gray, 170.

³ § 22.

⁴ *Pemberton v. Hoosier*, 1 Kas. 108; *Mattison v. Marks*, 31 Mich. 421; *Helmer v. Krolich*, 36 Mich. 371; *Bates v. LeClair*, 49 Vt. 229, *accord*.

Conf. *Hubbard v. Mosely*, 11 Gray, 170. — ED.

SECTION VII.

A Bill or Note must be certain in respect of Parties.

(a) DRAWER.

M'CALL v. TAYLOR.

IN THE COMMON PLEAS, MAY 26, 1865.

[Reported in 34 Law Journal Reports, 365.]

THE first count was against the defendant, as the acceptor of a bill of exchange for £300. The second count was on the same instrument as a promissory note, of which the defendant was alleged to be the maker. There were counts also for goods sold and delivered and on accounts stated.

Pleas: to the first count, a traverse of the acceptance; to the second count, a traverse of the making; and to the residue of the declaration, never indebted.

At the trial before Byles, J., at the London sittings after Hilary term last, it appeared that the instrument declared on in the first and second counts was in the following form:

“£300.

“Four months after date, pay to my order the sum of three hundred pounds for value received.

“To Captain TAYLOR, ship ‘Jasper.’”

There was no date to this instrument, nor the signature of any drawer; but there was written across it by the defendant these words: “Accepted, William Taylor.”

This instrument was given to the plaintiff by one Milne, the broker of the ship “Jasper,” on account of goods supplied to such ship by the plaintiff. The defendant was the captain of the “Jasper;” but the jury found that the goods had not been supplied on his credit, and that there was no debt due from the defendant.

The learned judge was of opinion that the instrument could not be declared on either as a bill of exchange or promissory note, and a verdict was accordingly entered for the defendant; but leave was reserved to the plaintiff to move to enter a verdict on either the first or second counts, if the instrument could be declared on as either a bill or note.

A rule *nisi* to that effect having been subsequently obtained by *Hannen*, for the plaintiff, —

Day now showed cause. The instrument is neither a promissory note nor bill of exchange. It contains no promise by the defendant to pay any one, and it wants a drawer and payee to make it a bill of exchange; it is altogether an incomplete and imperfect instrument, and the case is not distinguishable from that of *Stoessiger v. The South-Eastern Railway Company*.¹ There, one Cruttenden, being indebted to a Mr. Gould in more than £10, framed a document directed to himself, ordering himself three months after date to "pay to my order" the amount. The document had the stamp proper for a bill of exchange of that amount, and was in all respects like a bill of exchange, except that there was no drawer's name. Cruttenden wrote on it his acceptance, and caused it to be forwarded in a parcel directed to Gould, by a common carrier, in order that Gould might add his name as drawer. On an action against the carrier for the loss, the Court of Queen's Bench held that it was not a bill, order, note, or security for money, within the meaning of the Carriers Act, 11 Geo. IV., & 1 Will. IV., c. 68, § 1.

Hannen and *Lord*, in support of the rule. The document may be treated as a promissory note. The case of *Cruchley v. Clarence*² shows that where a bill of exchange is issued in blank for the name of the payee, a *bona fide* holder may insert his own name as the payee, and the drawer will be liable. In *Miller v. Thompson*, an instrument in the form of a bill of exchange drawn upon a joint-stock bank by the manager of one of its branch banks, by the order of the directors, was held to be properly declared upon as a promissory note. In *Fielder v. Marshall*,³ the instrument, which was in the form of a bill of exchange, was drawn by one A. Langstaff, and accepted by the defendant for a debt due from Langstaff to the plaintiff. The plaintiff's name was in the body of the instrument as payee, and in the corner at the foot of it the plaintiff's name and address were written; but the court considered the instrument as not addressed to any one, and treated it as a promissory note. The case of *Peto v. Reynolds* also furnishes an example of an instrument which was not good as a bill of exchange for want of a drawee, being considered good as a promissory note.

[SMITH, J. There was there the name of a payee.]

The case of *Armfield v. Allport*⁴ strongly resembles the present case. There it was held that an instrument drawn in the form of a bill of exchange, payable to bearer, even if accepted in blank, and afterwards filled up by the drawer, may be declared upon by the

¹ 3 El. & B. 549; s. c. 23 Law J. Rep. (N. S.) Q. B. 293.

² 2 M. & S. 90.

³ 9 Com. B. Rep. N. S. 606; s. c. 30 Law J. Rep. (N. S.) C. P. 158.

⁴ 27 Law J. Rep. (N. S.) Exch. 42.

indorsee as a promissory note made by the drawer and indorsed by the drawee.

[WILLES, J. That case would seem to have been an application of the doctrine in *Penny v. Innes*, that a person who puts his name on the back of a bill may be treated as a new drawer; but that doctrine is inapplicable to notes by reason of the Stamp Act.]

That case of *Armfield v. Allport* is certainly rather obscure; but the court there seemed to have considered that they were justified in treating the instrument as a promissory note. Where a payee is a fictitious person, the bill may be declared on as payable to bearer. *Byles on Bills*, 8th edit. 73; *Minet v. Gibson*.¹

ERLE, C. J. I am of opinion that this rule should be discharged. The declaration is on a bill of exchange, and also on the same instrument described as a promissory note. The instrument in question was in this form: [The learned judge read it.] It has no date and no drawer's name; but the defendant wrote his acceptance across it; and the question is, has the holder of such an instrument a right to declare on it either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note; and there has been no case cited as an authority for its being considered as either a bill or note. It is, in fact, only an inchoate instrument, though capable of being completed. Let the party who has the authority to make it a complete instrument do so; but if he will not do this, he cannot sue on it. The case of *Stoessiger v. The South-Eastern Railway Company* is directly in point. In the other cases which have been referred to, where effect was given to the instrument, nothing more had to be done to make the instrument complete; and so those cases are distinguishable from the present. The captain may possibly have given his acceptance for the necessities supplied to the ship, and the plaintiff may have had authority to put his name as drawer; but that should have been shown by his doing so. As it is, he seeks to sue on it without putting his name to it as drawer; and it may be that the reason is, because he never had authority to insert a drawer's name. It is, however, sufficient for us to say that the instrument is inchoate and imperfect; and therefore there is no ground for making this rule absolute.

WILLES, J., BYLES, J., and SMITH, J., concurred.

*Rule discharged.*²

¹ 3 Term Rep. 481.

² *Stoessiger v. S. E. R. R. Co.*, 3 E. & B. 549, *accord*.

See also *Vyse v. Clark*, 5 C. & P. 403; *Tevis v. Young*, 1 Met. (Ky.) 197, where the absence of a drawer's signature rendered the instruments inoperative.

For additional cases properly belonging to this section, see Appendix, pp. 881-884. — Ed.

A Bill or Note must be certain in respect of Parties — (continued).

(b) DRAWEE.

SHUTTLEWORTH v. STEPHENS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 21, 1808.

[*Reported in 1 Campbell, 407.*]

THE declaration was in the common form as upon a bill of exchange, drawn by the defendant on Messrs. John Morson & Co., payable to John Jenkins, and indorsed by him to the plaintiff.

In support of the action, a paper writing, of which the following is a copy, was given in evidence : —

“OCT. 21, 1804.

“Two months after date, pay to the order of John Jenkins £78 11s., value received.

THOS. STEPHENS.

“At Messrs. John Morson & Co.”

LORD ELLENBOROUGH held that this was properly declared on as a bill of exchange; and that Messrs. Morson & Co. might be considered as the drawees, although perhaps it might have been treated as a promissory note¹ at the option of the holder.²

*The plaintiff had a verdict.*³

GRAY v. MILNER.

IN THE COMMON PLEAS, FEB. 9, 1819.

[*Reported in 8 Taunton, 739.*]

ASSUMPSIT. The action was brought by the indorsee of the following bill of exchange, against the defendant, as acceptor : —

“MAY 20, 1813.

“Two months after date, pay to me, or my order, the sum of thirty pounds two shillings.

W. SUSTANANCE.

“Payable at No. 1 Wilmot Street, opposite the Lamb, Bethnal Green, London.”

¹ Mr. Justice Lawrence, having been applied to for leave to add a count to this declaration as on a promissory note, refused to interfere, saying that he thought it unnecessary.

² See *supra*, p. 19, note 4. — ED.

³ *Allan v. Mawson*, 4 Camp. 115; *Rex v. Hunter*, R. & R. 511; *Reg. v. Smith*, 2 Moody, C. C. 295, *accord.* — ED.

The words "Accepted, Charles Milner," were written across the bill, and Sustanance had indorsed it to the plaintiff.

The declaration contained two counts upon the bill. The first stated that Sustanance, according to the usage and custom of merchants, made his certain bill of exchange, and thereby requested the defendant, two months after the date thereof, to pay to him, or his order, the sum of £30 2s., and made the same bill payable at No. 1 Wilmot Street, opposite the Lamb, Bethnal Green, London; that the defendant accepted the same, and that Sustanance indorsed it to the plaintiff. It then averred the presentment for payment, and refusal. The second count stated that Sustanance made his certain other bill, and thereby required, two months after the date thereof, the payment to himself, or his order, of the sum of £30 2s., and that the defendant accepted the same, and that Sustanance indorsed it to the plaintiff.

At the trial before Dallas, C. J., at Westminster, at the sittings after the last term, it was objected that the instrument, not being directed to any person, was not a bill of exchange, according to the custom of merchants; that the first count could not be supported, as it stated that the drawer, by the instrument, requested the defendant to pay, whereas, in fact, the defendant was not named in it; that the second count did not state the defendant to be the person drawn upon, but merely stated his general acceptance, and omitted to notice that the instrument was made payable at a particular place. The jury found for the plaintiff, and the objections were reserved for the opinion of the court.

Copley, Serjt., on a former day in this term, had accordingly, upon these objections, obtained a rule *nisi* that the verdict might be set aside and a nonsuit entered; and mentioned that, in a former action which had been brought upon the same instrument in the Court of King's Bench, the plaintiff had failed, in consequence of the declaration having stated that the drawer, by the bill, requested the defendant to pay, as the court held that, the defendant not being named in the bill, the declaration was not supported by the instrument. He relied on the cases of *Gammon v. Schmoll*,¹ *Callaghan v. Aylett*,² and *Sanderson v. Bowes*, to show the necessity of averring a presentment at the particular place where the instrument is made payable.

Vaughan, Serjt., showed cause on a subsequent day. As to the objection of the bill not being directed to any person, it cannot now be sustained; for the defendant, having accepted the bill, has thereby admitted that he was the person to whom the bill was addressed. That this is a bill of exchange, and may be declared on as such, the

¹ 5 Taunt. 344; s. c. 1 Marshall, 80.

² 3 Taunt. 397.

cases of *Shuttleworth v. Stephens* and *Allan v. Mawson*¹ sufficiently prove. Although at first a drawee was wanting, yet, in the instant of acceptance, it became a perfect instrument.

Blosset, Serjt., in the absence of *Copley*, Serjt., in support of the rule, contended that this instrument could not be considered a bill of exchange, according to the usage and custom of merchants; neither is the defendant, according to such usage and custom, liable to pay, for an instrument not directed to any person cannot be a bill of exchange. The two cases cited on the other side are not conclusive: the judges there do not hold the instruments to be bills of exchange as not being addressed to any person, but because they consider them virtually addressed to drawees. In those cases, the names of the drawees appeared on the bills; here no name appeared, which creates a broad distinction between those cases and the present. The second count cannot be sustained, as the cases cited expressly decide the averment of presentment to be necessary. *Cur. adv. vult.*

DALLAS, C. J., on this day stated that the opinion of the court was that the instrument upon which this action was brought was clearly a bill of exchange, and could be declared upon as such; that it was not necessary that the name of the party who afterwards accepted the bill should have been inserted, it being directed to a particular place, which could only mean to the person who resided there; and that the defendant, by accepting it, acknowledged that he was the person to whom it was directed; and that the plaintiff, therefore, was entitled to retain his verdict. *Rule discharged.*²

PETO *v.* REYNOLDS.

IN THE EXCHEQUER, JAN. 24, 1854.

[Reported in 9 *Exchequer Reports*, 410.]

THE first count of the declaration stated that one A. Righton, on the 3d of September, 1852, in parts beyond the seas, — at Cameroons, Africa, — made his bill of exchange in writing, now overdue,

¹ 4 Campb. 115.

² *Regina v. Hawkes*, 2 Moody, C. C. 60 (a bill addressed "General Provision Warehouse, Baker, &c., Unett Street, West Street, Hockley," and accepted by "William Sellers"); *Wheeler v. Webster*, 1 E. & D. Sm. 1 (a bill without address, but accepted by "Daniel Webster"); *Grierson v. Sutherland*, Mor. Dict. Decis. 1447 (a bill without address, but accepted by "David Sutherland"), *accord*.

Conf. Reg. v. Curry, 2 Moody, C. C. 218, which was distinguished from *Reg. v. Hawkes*, *supra*, by the absence of an acceptance. — Ed.

in three parts, and directed the same to the defendant; and, by that his third of exchange, requested the defendant, at sight of that his third of exchange (the first and second of the same tenor and date being unpaid), to pay to the plaintiff or order the sum of £200; and the said A. Righton delivered the said third part to the plaintiff, and the defendant had sight of and accepted the said third part, but did not pay the said bill or any part thereof. The second count stated that the defendant, by his promissory note, now overdue, promised to pay to the plaintiff or order the sum of £200, but did not pay the same or any part thereof.

Pleas: to the first count, that the defendant did not accept the bill; to the second count, that the defendant did not make the note. Issues thereon.

At the trial before Talfourd, J., at the last Bristol assizes, it appeared that the defendant was a merchant at Bristol, and owner of a vessel called the "Mary," which in April, 1852, had sailed from that port to the coast of Africa, under the command of one Righton. The plaintiff was treasurer of a foreign missionary society, and the registered owner of a vessel called the "Dove," which had been sent by that society to the coast of Africa. Whilst Righton was at Cameroons, in Africa, he there saw the "Dove," and agreed with one Saker, an agent of the missionary society, to purchase that vessel for £300, for the purpose of loading the "Mary." He paid £100; and, in respect of the residue, Saker drew the following bill in sets:—

"Exchange for £200.

CAMEROONS, Sept. 3, 1852.

"At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. Peto, Esq., or order, the sum of two hundred pounds sterling, for value received; and place the same, as by letter of advice of 3d September, to the account of

ALFRED RIGHTON."

Across the face of the bill, Righton wrote the defendant's acceptance, as follows: "Accepted. Samuel Reynolds, Esq., Shorn Lane, Bedminster, Bristol."

A witness for the plaintiff stated that, in January, 1853, he presented the above bill to the defendant, who denied the authority of Righton to accept bills in his name, but nevertheless promised to pay this bill. It was not, however, clear from the testimony of the witness whether the defendant had made an absolute promise to pay, or a conditional promise to pay, at a future period. The defendant, who was called, denied that he had absolutely promised to pay the bill.

It was objected, on the part of the defendant, that there could be no valid acceptance of a bill which was not addressed to any one. The learned judge told the jury that, if they believed from the evidence that the defendant made an absolute and unconditional promise to pay the bill, that would amount to a parol acceptance of it. The jury found a verdict for the plaintiff on the first count for the amount of the bill and interest, and for the defendant on the second; leave being reserved to the defendant to move to enter a nonsuit.

A rule *nisi* having been obtained accordingly, —

Kinglake and *Barstow* showed cause. First, the instrument in question may be construed as a bill of exchange, addressed to S. Reynolds, the defendant. Its terms are, "Please to pay," which imports a request to some one to pay. Then the subsequent promise of the defendant is an admission that the bill was addressed to him. It is immaterial on what part of the bill the address appears: it may be made on the back of it. Com. Dig. tit. "Merchant" (E. 5); Story on Bills, p. 72, n. 7. Therefore the words, "Accepted, Samuel Reynolds," may be read as meaning "to be accepted by Samuel Reynolds." If they had been written on the corner of the bill, they would have been clearly susceptible of that construction.

Secondly, assuming that the instrument contains no address, it is, nevertheless, rendered a valid bill of exchange by the subsequent acceptance. If a bill be directed to a particular person, it cannot be accepted by any other, except for honor. *Davis v. Clarke*. But a bill; directed in blank, may be accepted by anybody; and the person who accepts it is estopped from afterwards denying that it was addressed to him. Where an instrument was drawn payable to the drawer's order at a particular place, without being addressed to any person by name, and was afterwards accepted by the person residing at the place where it was made payable, it was held that the defendant, by accepting it, acknowledged that he was the person to whom it was directed. *Gray v. Milner*. [PARKE, B. There the bill was addressed to the inhabitant of a particular house; and the fact of the defendant's acceptance of it was conclusive evidence that he lived at that house; and, consequently, the drawer was induced to look no further. ALDERSON, B. Suppose, in a case of this kind, the instrument is presented to two or more persons in succession, each of whom promises to pay it, which is the acceptor?] If there was one valid acceptance, there could be no other. In *Regina v. Smith*,¹ it was held by the judges that an instrument payable to the order of A., and directed "at Messrs. P. & Co., bankers," may be described as a bill of ex-

¹ 2 Moo. C. C. 295.

change in an indictment for forgery. [PARKE, B. In that case, according to the authority of *Gray v. Milner*, there was a drawee.] In *Regina v. Hawkes*,¹ the instrument was in the form of a bill of exchange, with a forged acceptance on it, but no person was named as the drawee; and the majority of the judges were of opinion that, in an indictment, the instrument was properly described as a bill of exchange. In *Regina v. Snelling*,² it was held that a document not addressed to any one might be shown by evidence to be an order for the payment of money, within the 11 Geo. IV. and 1 Will. IV. c. 66, § 3, and for whom it was intended. [PARKE, B. An order for the payment of money is different from an acceptance, which depends on the law-merchant.] Mr. Justice Story, in his *Treatise on Bills of Exchange*, p. 72, after stating that it is indispensable that there should be a drawee, proceeds thus: "But, according to our law, the want of an address to any particular person as drawee may, if the bill be drawn payable at a particular place or house, be well deemed a good bill of exchange in favor of an indorsee; and, if accepted by another person at the place or house designated, it will bind him as acceptor." At all events, the instrument is a valid promissory note. *Shuttleworth v. Stephens*.

Montague Smith and *Prideaux*, in support of the rule. In order to constitute a bill of exchange, the instrument must be addressed to some one. In *Chitty, Jr.*, on Bills, p. 1, "A bill of exchange is defined to be an open letter of request from one man to another, desiring him to pay a sum named therein to a third person, on his account." With the exception of *Regina v. Hawkes*, the authorities are uniform. The precedents of declarations on bills, both before and since the new pleadings rules, also support the proposition contended for. A bill addressed generally cannot be construed as a bill addressed to a particular individual. Suppose, in the case of a foreign bill, twenty persons in succession promised to pay it, how could an indorsee know whose acceptance it was? *Polhill v. Walter*³ is an express authority that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor. *Davis v. Clarke* is an authority to the same effect. This instrument cannot be treated as a bill accepted by the person to whom it was addressed, because it is addressed to no one. The words "accepted," &c., were intended as an acceptance, and not as an address.

POLLOCK, C. B. We are all of opinion that there ought to be a new trial, on the ground that the evidence was unsatisfactory; and, that being the case, I shall abstain from expressing any opinion on the

¹ 2 Moo. C. C. 60.

² 1 Dears. C. C. 219.

³ 3 B. & Ad. 114.

matter of law. When the new trial takes place, the parties will have an opportunity of raising this question on the record. I am not desirous of disparaging the conclusion at which the majority of the judges arrived in the case of *Regina v. Hawkes*, it is true, without publicly hearing an argument, and without publicly announcing the grounds of their decision, but nevertheless sitting in deliberation, where the liberty of a person, for a considerable period, was at stake.

PARKE, B. I think that there ought to be a new trial ; because the evidence, as to the acceptance of the bill, is unsatisfactory. At the next trial, the parties will have an opportunity of putting on the record the question whether this instrument is a bill of exchange ; and, therefore, it is not necessary to express any decided opinion on the point. I cannot, however, help observing that, with the exception of *Regina v. Hawkes*, there is no case in which it has ever been decided that an instrument could be a bill of exchange, where there was not a drawer and a drawee. With respect to that case, it does not seem to me entitled to the same weight of authority as a decision pronounced in the presence of the public, and on reasons assigned after hearing an argument in public. I must own that, but for that case, I should have had no doubt that the law-merchant required that every bill of exchange should have a drawer and a drawee. This instrument, though in the form of a bill, is not addressed to any one ; for I think it impossible to consider the acceptance as an address : but I do not see why the instrument may not be treated as a promissory note, because, upon the face of it, there is a promise to pay the amount written in the name of Samuel Reynolds. Then, if the authority to subscribe his name has been subsequently ratified, that amounts to a promise by him. Therefore, if, on the next trial, there is satisfactory evidence to show that the defendant absolutely promised to pay the amount mentioned in the instrument, he will be liable as upon a promissory note.

ALDERSON, B. I am of the same opinion. The evidence as to the defendant's promise is very unsatisfactory, and therefore there ought to be a new trial. With respect to the question whether this instrument is or is not a bill of exchange, the case of *Regina v. Hawkes* is undoubtedly in point. I must own, however, that I now think that I was wrong on that occasion. The case seems to have been decided on the ground that *Gray v. Milner* governed it ; and the fact was not adverted to, that *Gray v. Milner* may be thus explained : that a bill of exchange, made payable at a particular place or house, is meant to be addressed to the person who resides at that place or house. Therefore, in that case, the bill was on the face of it directed to some one ; and the court held that, inasmuch as the defendant promised to

to pay it, that was conclusive evidence that he was the party to whom it was addressed. But in the case of *Regina v. Hawkes* the instrument was addressed to no one. I concur with my Brother Parke, that, if the instrument in this case is not a bill of exchange, it is clearly a promissory note, if the evidence of an absolute promise to pay were believed.

MARTIN, B. I am of the same opinion. The verdict is unsatisfactory, and therefore there ought to be a new trial. With respect to the matter of law, if it were necessary to express a decided opinion, I should concur with my Brothers Parke and Alderson. It seems to me that it is absolutely essential to the validity of a bill of exchange that it should have a drawer and a drawee; and, except for the case of *Gray v. Milner*, I should have doubted whether the making a bill payable at a particular place was a sufficient address. However, assuming that in this case the defendant made an absolute promise to pay, why may not this instrument be treated as a promissory note? A promissory note need not be in any particular words. Here there is a request to pay a sum of money; then a person accepts that in the name of Samuel Reynolds, which acceptance is a direct engagement to pay. The person so accepting is not Samuel Reynolds, but a person who professes to do it with Samuel Reynolds's authority. Then, if one man professes to make a contract on behalf of another, and that other adopts it, it is the same as if he had made it himself. Therefore, if there was evidence of an absolute undertaking by Samuel Reynolds to pay, this instrument is his promissory note.

*Rule absolute.*¹

¹ In *Fielder v. Marshall*, 9 C. B. n. s. 606, this instrument, —

“50 KING WILLIAM STREET, LONDON BRIDGE,
March 24, 1860.

“Two months after date, pay to Mrs. Emma Fielder, or order, thirty-five pounds, value received.

“To Mrs. EMMA FIELDER,

“Nelson Lodge, Trafalgar Square, Chelsea.”

Accepted, payable at
60 King William
Street, City.
SAMUEL MARSHALL,

ANN LANGSTAFF.

was held to be a note, and not a bill.

Conf. Anon., 12 Mod. 447. “A bill of exchange was directed to A, or, in his absence, to B, and began thus: ‘Gentlemen, — Pray pay.’ The bill was tendered to A, who promised to pay it as soon as he should sell such goods; and, in an action against him for non-payment, the declaration was of a bill directed to him without any notice of B. Holt, C. J., held it well.” — Ed.

A Bill or Note must be certain in respect of Parties — (continued).

(c) PAYEE.

FISHER v. POMFRET.

IN THE KING'S BENCH, EASTER TERM, 1697.

[Reported in 12 Modern Reports, 125.]

PER CURIAM. A bill of exchange payable to a man and his order, or to his order only, is one and the same.¹



CHADWICK v. ALLEN.

IN THE KING'S BENCH, TRINITY TERM, 1726.

[Reported in 2 Strange, 706.]

UPON demurrer to a declaration on the following note, it was held to be a note within the statute: "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes for which £400 were paid him on account of Colonel Syngé, and that Sir Andrew delivered me Major Graham's receipt and bill on me for £10, which £10 and £15 5s. balance due to Sir Andrew, I am still indebted, and do promise to pay." *Judicium pro quer. Strange pro defendente.*²

¹ Frederick v. Cotton, 2 Show. 8; — v. Ormston, 10 Mod. 286; Gregory v. Walcup, Com. 75; Hart v. King, 12 Mod. 309; Smith v. McClure, 5 East, 476; Myers v. Wilkins, 6 Up. Can. Q. B. 487; Sherman v. Goble, 4 Conn. 246; Howard v. Palmer, 64 Me. 86; Durgin v. Bartol, 64 Me. 473; Huling v. Hugg, 1 W. & S. 418, *accord.* — ED.

² "No particular form of words is necessary to constitute a note, and Chadwick v. Allen is in point to show that it is not necessary to name the payee more explicitly than this note does: the substance of the note there was, '£15 5s., balance due to Sir Andrew Chadwick, I am still indebted, and do promise to pay.' Whom he was to pay was not in terms stated, but as no other payee was named, who but Sir A. Chadwick could be the object of his promise?" Per Bayley, J., Green v. Davies, 4 B. & C. 239. To the same effect are: Ashby v. Ashby, 3 Moo. & P. 186; Bullen v. McGillicuddy, 2 Dana, 90; Commw. Ins. Co. v. Whitney, 1 Met. 21; Cummings v. Gassett, 19 Vt. 308; Alexander v. Alexander, Court of Session, Feb. 26, 1830; M'Intosh v. Stewart, Court of Session, May 13, 1830. See Platzer v. Norris, 38 Tex. 1. — ED.

REX v. DANIEL GILBERT RANDALL.

CROWN CASES RESERVED, 1811.

[Reported in *Russell & Ryan*, 195.]

THE prisoner was tried before Mr. Justice Bayley, on an indictment for forging and uttering a navy pay bill importing to be drawn by George Sidley, as master of the "Royal Sovereign," and payable to or order, and also for forging and uttering an indorsement upon it in the name of John James.

The prisoner was found guilty, but the following objections were taken to the bill:—

First, That it was payable to no one, because there was no payee's name;

Secondly, That it was not numbered as the 35 Geo. III. c. 94, § 3, requires; and

Thirdly, That the bill misrepresented the rate of the "Royal Sovereign," she being really a first rate, but described in the bill as a second.

The learned judge overruled the second and third objections, on the ground that even supposing the requisites of the 35 Geo. III. were not complied with, the instrument was still a bill of exchange independently of the statute; and there were counts in the indictment which described it as a bill of exchange. He also overruled the first objection, on the ground that a bill payable to blank or order was in legal operation payable to the order of the drawer; but the learned judge reprieved the prisoner, thinking that the instrument was incomplete for want of an indorsement by the drawer, and that therefore no person of ordinary caution could be imposed upon by it. These points were reserved for the consideration of the judges.

In Trinity term, 15th of June, 1811, all the judges were present (except Lawrence, J.), and the conviction was held wrong. The judges were of opinion it was not a bill of exchange because there was no payee.¹

¹ *Richard's Case*, R. & R. 193; *Enthoven v. Hoyle*, 13 C. B. 373; *Mut. Ins. Co. v. Porter*, 2 All. (N. B.) 230; *Prewitt v. Chapman*, 6 Ala. 86; *Smith v. Bridges*, Breese, 2; *Mayo v. Chenoweth*, Breese, 155; *Greenhow v. Boyle*, 7 Blackf. 56; *Brown v. Gilman*, 13 Mass. 158; *Matthews v. Redwine*, 23 Miss. 233; *Douglass v. Wilkeson*, 6 Wend. 637; *Seay v. Tenn. Bank*, 3 Sneed, 558, *accord*.

Rich v. Starbuck, 51 Ind. 87; *Davega v. Moore*, 3 McC. 482, *contra*. — Ed.

THE KING v. BOX.

OLD BAILEY SESSIONS, MAY 12, 1815.

[Reported in 6 Taunton, 325.]

THE prisoner was tried and found guilty at the Old Bailey Session on the 10th April, 1815, before Chambre, J., upon an indictment which charged that he feloniously had falsely made, forged, and counterfeited a certain promissory note for the payment of money, which was as follows :—

“On demand, we promise to pay Mesdames Sarah Wallis and Sarah Doubtfire, stewardesses for the time being of the Provident Daughters’ Society, held at Mr. Pope’s, the Hope, Smithfield, or their successors in office, sixty-four pounds, with 5 per cent interest for the same, value received this 7th day of February, 1815.

“For Felix Calvert & Co.

“£64.

JOHN FORSTER.”

Adolphus moved, in arrest of judgment, that this was no promissory note ; and the case was in Easter term argued before the twelve judges. *Adolphus*, for the prisoner, referred to the definition of a promissory note by Blackstone, J. (2 Bl. Com. 467). That it is a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often, to the bearer at large. The same definition is followed, with little variation, by the authors of several modern treatises. Chitty on Bills (2d ed.), 233 ; Kyd on Bills. So another (Bayley on Bills) eminent writer says a promissory note may be defined to be a written promise for the payment of money absolutely and at all events. Before bills of exchange and promissory notes were in use, merchants raised money on instruments called single bills, the form of which is still extant (Postlethwaite’s Dictionary of Commerce, article Bill) : that bill could only charge the person assigning it by a special promise indorsed thereon to pay it in case the maker did not pay. The attempt to put promissory notes into circulation was held by Lord Holt, C. J. (Clerke v. Martin¹), as a strange attempt to set up the law of Lombard Street above the law of the realm ; and he treated them merely as evidence of a debt, like any other letter, but not as creating a debt. The Statute 3 & 4 Anne, c. 9, made them negotiable ; but they owe their whole and only force to that act. This instrument contains no one of the properties of a promissory note. Notes of hand are frequently given to parish officers, and fall into the hands of their successor. That forms no proposition applicable to this case.

¹ 2 Ld. Ray. 757.

Gurney, contra. This instrument contains a written promise for payment of money absolutely and at all events. This keeps clear of all the cases. No particular form of words is necessary. A promise not to pay (2 Atk. 32) may be a good promissory note. If the payees are not rightly described, the misdescription may be rejected. *Brown v. Harrowden*. Lord Kenyon, C. J., says it is not necessary now to consider whether Lord Holt were right in so pertinaciously adhering to his opinion before the statute of Anne, that no action could be maintained on promissory notes as instruments, but that they were only to be considered as evidences of the debt; but look to the words of the Act of Anne, both in the preamble and enactment: it is observable that the act does not say that a promissory note had no legality, but that it was not assignable by the custom of merchants. This instrument, before the statute, could not be described in the indictment for forgery as any thing but a promissory note; nevertheless, the better opinion was that the forgery of less instruments than deeds was even then an indictable offence. *Ward's Case*.¹ This instrument is in every particular a promissory note.

Adolphus, in reply. No deed is made in which the word "promise" is not introduced: yet a covenant is not a promissory note; neither is this. This may be a bond with an implied condition, a covenant without formalities; but it is not a promissory note. If Lord Holt's opinion in *Clerke v. Martin*¹ was law, a note had no legal existence whatever; for that was not an action by an indorsee, but by the payee; and Holt, C. J., held he might have recovered on the counts on an *indebitatus assumpsit*, upon the evidence contained in this paper; but that he could not recover on it as a special contract by the custom of merchants. The terms of the statute go not merely to the question whether notes were transferable or negotiable, but it puts them generally on the ground of bills of exchange. This wants the simplicity of character of a promissory note; and the judgment must be arrested.

Cur. adv. vult.

LE BLANC, J., now delivered judgment. The prisoner was tried at the last session on an indictment for forging and uttering, knowing it to be forged, a promissory note for the payment of money. Several objections to the evidence given to support the indictment were taken, but they were disposed of by the bench, and the jury found the prisoner guilty. Another objection was taken in arrest of judgment, and argued before all the judges, that the instrument in question, such as it is stated in the indictment, was not a promissory note within the statute, so as to be the subject of an indictment

¹ 2 Ld. Ray. 1461; s.c. 2 Str. 747.

for forging, or uttering it, knowing it to be forged. The objection to this instrument was founded on this circumstance, that it appears to be made payable to two ladies, describing them as stewardesses of a provident society, or their successors in office; and that this society, not being enrolled according to the statute (33 Geo. III. c. 34), this note was not capable to ensure to their successors, and was not negotiable. The judges are of opinion that this is, as stated in the indictment, a valid promissory note within the Statute of Geo. II. It is not necessary that such a note should be in itself negotiable. It is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not. And though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it. Therefore it is an instrument capable of being the subject of forgery; and there is no ground to arrest the judgment; and the judges are all of opinion that the conviction is right.¹

BLANCKENHAGEN AND ANOTHER *v.* BLUNDELL.

IN THE KING'S BENCH, APRIL 28, 1819.

[*Reported in 2 Barnewall & Alderson, 417.*]

DECLARATION alleged that the defendant, on the 24th May, 1817, made a promissory note, and delivered the note to the plaintiffs; by which note defendant promised to pay to J. P. Damer, then of Rio de Janeiro, or to the plaintiffs, or to his or their order, £250 sterling, in Portuguese currency, at the rate of 57*d.* sterling per mil-ré, together with interest from the 27th July, one-half at fourteen, and one-half at twenty-six months, from the date, value received; whereby, and by force of the statute, the defendant became liable to pay, &c., and, being liable, promised, &c. The declaration then stated that the money mentioned in the note became due, according to the tenor and effect thereof; yet that the defendant, although often requested, had not paid the same to the plaintiffs, nor had he paid the same to Damer. The second count was upon the same promissory note; but only alleged a general liability to pay, without treating it as a promissory

¹ *Patton v. Melville*, 21 Up. Can. Q. B. 263 (a promise to pay "J. P., Treasurer, or his successor, duly appointed," &c.); *Davis v. Garr*, 2 Seld. 124 ("I promise to pay to Joseph M. White, Charles A. Davis, and Louis McLane, Trustees of the Apalachicola Land Company, or their successors in office, or order," &c.), *accord*.

See *Yerby v. Sexton*, 48 Ala. 311; *Buck v. Merrick*, 8 All. 123. — Ed.

note within the statute of Anne. The third count was similar to the first, with the exception that it contained an averment that Damer died before the note became payable. To this declaration there was a general demurrer, which was now argued by

Espinasse, in support of the demurrer. No action is maintainable on any such instrument as this, unless it be a promissory note within the Statute of 3 & 4 Anne, c. 9. *Trier v. Bridgman*.¹ The second count of the declaration cannot therefore, at all events, be supported. But, secondly, this is not a promissory note within the meaning of that statute; for it is not payable to either of the payees, at all events, but only on the contingency of its not having been paid to the other; and a bill of exchange in this form would not be negotiable by the custom of merchants. *Carlos v. Fancourt*² and *Hill v. Halford*³ are authorities in point.

Campbell, contra. An action may be maintained, as between these parties, upon this instrument, although it be not negotiable; for on the face of it it is stated to have been made for value received. The note itself contains a promise, and a consideration for that promise. An action, therefore, might have been maintained upon this instrument at common law. But, secondly, this is a valid note within the statute of Anne, as between the original parties, although, perhaps, it may not be negotiable. It is not payable upon a contingency; for a note payable to two partners, which, in effect, is payable to one or to the other, is equally so. So, also, foreign bills of exchange, drawn in sets, may equally be said to be payable upon contingencies; for the direction is to pay this my first bill of exchange, the second and third not being paid; or the second, the first and third not being paid; which is in effect directing the bill to be paid to the indorsee who may hold the first, or to the indorsee who may hold the second.

ABBOTT, C. J. I have no doubt that this instrument, in the form in which it is declared on, is not a promissory note within the statute of Anne; for, if a note is made payable to one or other of two persons, it is payable to either of them only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute. I am also of opinion that the second count cannot be supported; for admitting that an action might be maintained upon a note which appeared to be for value received, still the consideration should be stated in the declaration, in order that it may be seen if it is a consideration which will support an action; for there are many considerations which will not support an action, although there may be a subsequent promise. If, therefore, an action could be maintained in such a case, the plaintiff ought to declare upon the

¹ 2 East, 359.

² 5 Term Rep. 482.

³ 2 Bos. & Pull. 413.

original consideration. For these reasons, I am of opinion that there should be judgment for the defendant.

BAYLEY, J. I am of the same opinion. If there had been any community of interest stated between the payees, so as in any respect to identify Damer and Blanckenhagen, it is possible that an action might have been maintained on this note; but in the way in which the declaration has been framed, stating this as a note payable to one or the other, I am very clearly of opinion that it is not that description of note which the statute of Anne contemplated.

HOLROYD, J. I am of the same opinion, that this note does not come within the description of notes contemplated by the statute of Anne. It is, in fact, a promise to pay to A if the maker does not pay to B and C. It is therefore a conditional promise, and consequently not within the statute. And I am also of opinion that the second count cannot be supported; for at common law a promissory note or bill of exchange was not considered as a specialty. Indeed, Lord Holt continually insisted that no action could be brought on a promissory note, but that it must be brought for the original consideration. And the statute of Anne itself recites, "That the payee of a note cannot maintain an action by the custom of merchants, against the person who first made and signed the same." This, therefore, is a legislative declaration, that at common law no such action could be brought upon a promissory note; and therefore I am of opinion, upon both grounds, that there ought to be judgment for the defendant.

BEST, J., concurred.

*Judgment for defendant.*¹

REGINA v. J. BARTLETT.

AT NISI PRIUS, CORAM ERSKINE, J., APRIL 6, 1841.

[Reported in 2 *Moody & Robinson*, 362.]

THE prisoner was indicted for forging and uttering a bill of exchange, and the acceptance of a bill of exchange.

In several of the counts, the bill was set out *verbatim*, and in all it was called a bill of exchange.

¹ *Reed v. Reed*, 11 Up. Can. Q. B. 26; *Inglis v. Wiseman*, Mor. Dict. Decis. 1404; *Musselman v. Oakes*, 19 Ill. 81; *Bennington v. Dinsmore*, 2 Gill, 348; *Osgood v. Pearsons*, 4 Gray, 455; *Carpenter v. Farnsworth*, 106 Mass. 561 (*semble*); *Walrad v. Petrie*, 4 Wend. 575; *Quinby v. Merritt*, 11 Humph. 439, 440 (*semble*), *accord*.

Samuels v. Evans, 1 McL. 473; *Spaulding v. Evans*, 2 McL. 139; *Ellis v. McLe-moor*, 1 Bail. 13, *contra*.

Conf. Durgin v. Bartol, 64 Me. 473; *Willoughby v. Willoughby*, 5 N. H. 244; *Westgate v. Healy*, 4. R. I. 523. — Ed.

The document when produced agreed with that set out, and was in the following form : —

“Nov. 10, 1840.

“Please to pay to your order the sum of forty-seven pounds for value received.

J. BISHOP.”

“Accepted. G. PECKFORD.

“To Mr. G. PECKFORD, Yeovil.”

The paper was indorsed “J. Bishop.”

It was objected for the prisoner that this could not be called a bill of exchange : it was nothing more than a request to a man to pay himself, and the acceptance of such a document laid the acceptor under no obligation to a third party.

ERSKINE, J., said he should reserve the point for the consideration of the judges, and left the case to the jury, who convicted the prisoner ; and he was sentenced to transportation.

His Lordship, however, afterwards thought the objection so clearly valid that he did not submit the case to the judges, but recommended a pardon for the offence.



JOHN COWIE, ADMINISTRATOR OF JOHN STORM, DECEASED,
v. EDWARD STIRLING.

IN THE EXCHEQUER CHAMBER, MAY 1, 1856.

[*Reported in 6 Ellis & Blackburn, 333.*]

JOHN STORM sued the defendant, Edward Stirling, in the Court of Queen's Bench. The first count alleged that, whereas defendant, on the 10th of March, 1845, in parts beyond the seas, to wit, at Calcutta in the East Indies, made his promissory note in writing, and thereby promised to pay to the secretary for the time being of the Indian Laudable and Mutual Assurance Society twenty thousand company's rupees, with interest at the rate of six per cent per annum, nine months after the date thereof, which period and the time for payment of the said note had expired before the commencement of this suit ; and then delivered the said note to the plaintiff, who, at the time of the making of the said promissory note and from thence hitherto, was and is the secretary of the said Indian Laudable and Mutual Assurance Society : averment that the said sum of twenty thousand company's rupees was and is of great value, to wit, £2,000 of lawful, &c. : breach, non-payment.

Plea to this: that defendant "did not make the alleged promissory note."

The plaintiff took issue on this plea. There were also other issues of fact.

On the trial, before Crompton, J., at the Middlesex sittings in Michaelmas term, 1853, a special verdict was found, of which the parts now material were as follows.

As to the first issue. That the defendant, at a certain place, &c. (as in the declaration), made and signed and delivered to the plaintiff a document in the words and figures following, that is to say:—

"C. 20,000.

CALCUTTA, 10th of March, 1845.

"Nine months after date, I promise to pay to the secretary for the time being of the Indian Laudable and Mutual Assurance Society, or order, company's rupees, twenty thousand, with interest at the rate of six per cent per annum. And I hereby deposit in his hands twenty-two Union Bank shares, as particularized at foot, by way of pledge or security for the due payment of the said sum of company's rupees, twenty thousand, as aforesaid; and, in default thereof hereby authorize the said secretary for the time being, forthwith, either by private or public sale, absolutely to sell or dispose of the said twenty-two Union Bank shares, so deposited with him; and out of the proceeds of sale to reimburse himself the said loan of company's rupees, twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which may be forthcoming from such sale. And I hereby promise and undertake to make good whatever, if any thing, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of company's rupees, twenty thousand, and interest as aforesaid.

EDWD. STIRLING."

(Then followed the number of the shares.)

"No. 33. Due 10/13 Dec. /45."

That the Indian Laudable and Mutual Assurance Society, in the said document mentioned, is the Indian Laudable and Mutual Assurance Society within in the declaration mentioned; and that the plaintiff, at the time of the making of the said document, and from thence until the time of the commencement of the within-mentioned action, was the secretary of the said society. That the name Edward Stirling, set and subscribed to the said document, is of the proper handwriting of the defendant. That the said sum of twenty thousand company's rupees, at the time of the making of the said document, and when the same became due, was of the value of £2,000 of lawful money of Great Britain. The special verdict then left the first issue to the court in the usual form.

The findings on the other issues were immaterial to the question now decided.

Judgment was given in the Court of Queen's Bench for the defendant, in Trinity term, 1854.¹

¹ "Lord Campbell, C. J., now delivered the judgment of the court. The only question in the case was whether the document in question can be treated as a promissory note. Two objections were taken to its being so treated: first, that it was not payable to any certain person, but to the person, if any, who at the time when the note should become payable might fill the situation of secretary to the company; and, secondly, that the additional promise to pay the deficiency in the event of a sale of the deposited bank-shares prevented the instrument from being a promissory note.

"With reference to this latter objection, it was argued, on the part of the defendant, that the promise to pay the deficiency in the event of a sale after default would give a new cause of action for such deficiency after the original cause of action had been barred by the Statute of Limitations; that such promise was part of an entire agreement; that it was not transferable, and prevented the instrument from being a promissory note. It was said, on the other hand, that the promise to pay the balance was no more than what the law would have implied; that there was no consideration for such additional promise; and that even if there was such an additional promise founded on a sufficient consideration, still as it did not qualify the promise to pay the amount of the note at the end of the nine months, and was a collateral promise with reference to the collateral security, it would not prevent the document which contained a positive promise to pay at the end of nine months from operating as a promissory note between the parties, even if it prevented it being assignable under the Statute of 3 & 4 Anne, c. 9, § 1. *Wise v. Charlton* was cited, as showing that such collateral security, not qualifying the promise to pay at the given time, did not prevent the document operating as a promissory note. And the judgment of Patteson, J., in that case was relied on, in which he says: 'This is not the less a promissory note from its being also an agreement of another kind.'

"It becomes, however, unnecessary for us to decide or express any opinion on this part of the case, as we are of opinion that the first objection is fatal to the plaintiff's case

"The nature and every definition which we find in the books of a promissory note show that it must contain an express promise to pay to a person therein named or designated, or to his order, or to bearer. See *Byles on Bills*, 6th ed. p. 4; *Colehan v. Cooke*; 2 Bl. Com. 467. If the person to whom, or to whose order, it is to be paid is uncertain, and it depends on a contingency to whom, or to whose order, payment is to be made, it is not a promissory note unless it can be treated as payable to bearer.

"It was urged, on behalf of the plaintiff, that we might treat this as a note made payable to the plaintiff, who at the date of the document was the secretary of the society, by his description as such secretary. And it was said that the subsequent part of the instrument, in which it is said that the plaintiff deposits in *his* hands, and that he authorizes the *said secretary for the time being* forthwith to sell, points to the then secretary as the person to whom alone the promise is made and to whom alone the note is payable.

"There is no doubt, upon the authorities, that it is quite sufficient to make a note

John Cowie, the administrator, with the will annexed, of the plaintiff below, suggested error in the Court of Exchequer Chamber, which the defendant denied.

by a description or *designatio personæ* of this kind; (a) but we do not think that we can put the above construction on the document now before us. The use of the words, 'for the time being,' in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument, satisfy us that the payment was to be made to the individual who, at the time of the instrument falling due, should fill the situation of secretary of the company, and not to the plaintiff, unless he happened to be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the document became due. The other construction would in effect be to hold that the words, 'the secretary for the time being,' meant the *now* secretary; but we think that the words were used for the very purpose of excluding that construction.

"The case of *Rex v. Box*, which was relied on by the plaintiff, is clearly distinguishable from the present. There the note was payable on demand to A. B. and C. D., by name, 'stewardesses' of a provident society, 'or their successors in office.' There the parties to whom the note was given were designated by name; and the description of them as stewardesses, which it was said they were not legally, being mere matter of description, did not alter the promise to pay them on demand; and the judges said that, although they could have no legal successors as stewardesses, still their executors or administrators might sue. In the present case, as we read the document, the money was never to become payable to the plaintiff, and he was never to have any right upon the instrument, unless he happened to fill the situation of secretary to the society at the end of nine months. In *Rex v. Box*, the note, as construed by the court, gave an immediate right of action to the payees named, on which they might have immediately sued; and the court seems to have thought that the mention of the successors, who could have no legal existence, might be rejected, so that it did not destroy the immediate legal right expressly given to the plaintiffs on demand. Here there is no right given to the plaintiff, except by the words promising to pay 'the secretary for the time being.' It was not suggested, in that case, that the note would be good if it amounted to such a floating contingent promise as we think that the words are intended to import in the case before us.

"It was suggested, also, in the argument, that, if there were no payee who could sue, the note might be treated as payable to bearer. But we think that in so holding we should give a meaning to the note contrary to the clearly expressed intention

(a) *Moody v. Threlkeld*, 13 Ga. 55 (a promise to pay "the administrators of the estate of J. H."); *Adams v. King*, 16 Ill. 169 (a promise to pay "the administrators of A. C."); *Moore v. Anderson*, 8 Ind. 18 (a promise to pay to "St. Bt. Juda and owners, or order"), *accord*.

See *Meggins v. Harper*, 2 Cr. & M. 322 (a promise to pay "the trustees acting under the will of W. B."); *Robertson v. Sheward*, 1 M. & G. 511 (a promise to pay to "the manager of the National Provincial Bank of England").

Whatever doubt may exist as to the negotiability of an instrument payable to the order of administrators or trustees who are not named therein, it is clear that an instrument payable "to the estate of A" is not a promissory note. *Tittle v. Thomas*, 30 Miss. 122; *Bowles v. Lambert*, 54 Ill. 237; *Lyon v. Marshall*, 11 Barb. 241.

Conf. Hendricks v. Thornton, 45 Ala. 299. — Ed.

The case was now argued.

Lush, for the party suggesting error (administrator of plaintiff below). The judgment of the court below proceeds on the ground that the instrument is not a promissory note because the money is not made "payable to any certain person, but to the person, if any, who at the time when the note should become payable might fill the situation of secretary to the company." It is true that the expression "secretary for the time being" would, if standing alone, be ambiguous. But then follows the statement, "I hereby deposit in his hands twenty-two Union Bank shares," &c.: that shows that, by the secretary for the time being, is designated the secretary at the moment of making the note and depositing the shares; and this is enough without any name. The additional words "for the time being" would not destroy the effect of what had preceded (*Wise v. Charlton*); if they did, they would be rejected, *ut res magis valeat quam pereat*. The then actual secretary is "the said secretary" who is authorized to sell the shares; and the contingency of his ceasing to be secretary is provided for by the note being made payable to order: the person taking the note might indorse it over forthwith.

C. E. Pollock, contra. The promise is to pay nine months after the date of the note. The promise is therefore either to pay the person, who shall be secretary nine months thereafter, or to pay the present secretary if he shall be secretary at the expiration of that time. On either interpretation, the note is bad, as a promissory note, for uncertainty. It cannot be contended that John Storm, had he ceased to be secretary at the maturity of the note, could then have sued on it. The maxim, *ut res magis valeat quam pereat*, is sound; but it is outweighed by the importance of not introducing uncertainty into mercantile negotiable instruments. (He was then stopped by the court.)

of the maker. This is not a case of fraud, or of a fictitious payee; but the defect is, that it is a promise to pay some person to be ascertained *ex post facto*; and we know no authority to show that under such circumstances we can hold this instrument to be a note payable to bearer, because, though valid perhaps as an agreement, it cannot be enforced as a promissory note. The promise is to pay to, or to the order of, an uncertain person. But, if founded on good consideration, it may probably give rights legal or equitable to the society. But we think that we should be making a new instrument if we were to hold it a promissory note payable to bearer; and the case does not fall within any of the decisions cited on this branch of the argument.

"As we think, therefore, that this is not a promissory note, our judgment is for the defendant.

Judgment for defendant."

JERVIS, C. J. I am clearly of opinion that this judgment should be affirmed. Whatever desire we may feel to aid in enforcing a contract, we must hold that, to make a promissory note, there must be a payee ascertained by name or designation. Now, as we said in the court below, this money is made payable, not to the then secretary, but to the person who should be secretary nine months thence, when the payment was to be made. That was the clear intent. As to the shares being deposited in the hands of the present secretary, that is merely for security. The payment itself is to be made to the person who shall be secretary. So that, even if we look at the collateral agreement (which I think we cannot do), we find no certain payee.

POLLOCK, C. B., ALDERSON, B., CRESSWELL, J., and CROWDER, J.,
concurring. *Judgment affirmed.*¹

WATSON, SOUTHERN, AND MAYER v. GEORGE EVANS.

IN THE EXCHEQUER, JAN. 19, 1863.

[Reported in 1 Hurlstone & Coltman, 662.]

DECLARATION. That the defendant and William Patrick Evans and George Thomas Evans, on, &c., made their joint and several promissory note in the words, letters, and figures following, and as follows, that is to say:—

“£100.

LEAMINGTON, Dec. 2d, 1858.

“On demand, we jointly and severally promise to pay Messrs. Joseph Watson, Thomas Southern, and Daniel Mayer, or to their order, or the major part of them, the sum of one hundred pounds, with lawful interest, for value received.

“GEORGE EVANS.

“WILLIAM PATRICK EVANS.

“GEORGE THOMAS EVANS.

That the said makers, by the said names following in the said note contained, that is to say, Joseph Watson, Thomas Southern, and Daniel Mayer, meant the plaintiffs; but the defendant and the said other makers did not, nor did either of them, pay the said note.

¹ Yates v. Nash, 8 C. B. N. s. 581, *accord*.

Bacon v. Fitch, 1 Root, 181 (a promise to pay to heirs of A. B., who was then alive), *contra*. — ED.

Demurrer, and joinder therein.

Hayes, Serjt. (*C. E. Coleridge* with him), in support of the demurrer. The document is void for uncertainty. Is the money to be paid to the three payees, or any two of them? Again, do the words "or the major part of them" refer to the payment or the indorsement, or to both? [POLLOCK, C. B. Is it not a promise to pay to the three persons or their order, or the order of the major part of them?] Suppose two of them said "pay to us;" and the other said "pay all three." If two alone sued, could the maker plead in abatement the non-joinder of the third? Assuming that the promise is to pay all three provided they agree, if not to pay any two of them, suppose they all disagree, and each says, "Do not pay to the other." [MARTIN, B. Payment to one of several joint creditors is a payment to all.] The general rule of law is qualified by the express words of the contract. In *Bayley on Bills*, p. 34, 5th ed., it is laid down that "uncertainty as to the person to whom the payment shall be made will prevent the document from being a bill or note; as making it payable to A or B." The authority there cited is *Blanckenhagen v. Blundell*, where *Abbott*, C. J., and *Holroyd*, J., agreed that such a document cannot be a promissory note within the Statute 3 & 4 Anne, c. 9, the promise being conditional, to pay A only if the maker had not paid B. [MARTIN, B. Here the three payees are suing, which distinguishes the case from *Blanckenhagen v. Blundell*.] Who is to indorse the note, the three or any two of them? [MARTIN, B. The words, "or to their order, or the major part of them," mean the order of all three or of any two of them. The words "or the major part of them" must refer to the last antecedent order. WILDE, B. It is, "I promise to pay to all three or their order, but I allow any two to sign for them all."] If the indorsement may be made by the three, or any two of them, *Blanckenhagen v. Blundell* is an authority that the document is not a promissory note within the Statute 3 & 4 Anne, c. 9. [MARTIN, B. There cannot be any doubt in this case, as the three payees are suing. In the *Author's Life*, prefixed to the 9th edition of *Noy's Maxims* by *Bythewood*, p. viii., the following anecdote is related: "Three glaziers at a fair left their money with their hostess while they went to market: one of them returned, received the money, and absconded; the other two sued the woman for delivering what she received from the three before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, not being employed in the cause, desired the woman to give him a fee, as he could not plead in her behalf unless he was employed; and, having received it, he moved in arrest of judgment that he was retained by the defendant, and

that the case was this: the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid whenever the three men should demand it together. This motion altered the whole proceedings."] See *Brandon v. Scott*.¹

Mellish appeared for the plaintiffs, but was not called upon to argue.

PER CURIAM.² There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

HOLMES AND OTHERS v. JAQUES.

IN THE QUEEN'S BENCH, APRIL 16, 1866.

[*Reported in Law Reports, 1 Queen's Bench Reports, 376.*]

DECLARATION by the plaintiffs as payees of a promissory note against the defendant as maker. Plea: traverse of the making.

At the trial before Shee, J., at the last spring assizes at Leeds, it appeared that the defendant, in 1861, signed the following instrument:—

“HARROGATE, March 18, 1861.

“On demand, I promise to pay to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being, the sum of £100, in four equal instalments of £25 each, each of such instalments to be due and payable on the 1st October, annually, for value received.”

The plaintiffs and four other persons were the original trustees of the chapel, the plaintiffs being the survivors. A verdict was returned for the plaintiffs for the amount claimed, with leave to move to enter a verdict for the defendant, if the court should be of opinion that the instrument was invalid as a promissory note.

Manisty, Q. C., moved accordingly. The instrument sued upon is not a valid promissory note, owing to the uncertainty of the payees. It is payable to the trustees, or their treasurer, for the time being; if this be taken to mean the trustees for the time being, or their treasurer for the time being, then it is uncertain as to both, and is bad as a promissory note. *Cowie v. Stirling*, *Yates v. Nash*.³ But the principal objection to the instrument is that it is payable to the trustees, or

¹ 7 E. & B. 234.

² Pollock, C. B., Martin, B., and Wilde, B.

³ 8 C. B. (N. S.) 581.

the treasurer, in the alternative; and *Blanckenhagen v. Blundell* is a direct authority that this uncertainty renders the instrument no promissory note.

[BLACKBURN, J. For all that appeared in that case, the persons named in the alternative as payees were strangers in interest; and Bayley, J., suggests that, had there appeared a community of interest, then (as appears here) an action might possibly have been maintained.

LUSH, J. You admit that a note payable to "trustees" is sufficient without naming them?]

Yes. That cannot be maintained as an objection.¹

COCKBURN, C. J. I am of opinion that there should be no rule. I fully concur in what Mr. Manisty has said, that the payee must be a person certain; and a promise to pay A or B, apparent strangers, in the alternative, would not be a good promissory note; but all this instrument shows is that it is payable in the first instance to the trustees as payees, but with the option of the maker to pay to the treasurer for the time being, as their agent.

The treasurer would have no authority to sue in his own name, but only to receive the money on behalf of the trustees. I think it would be to introduce unnecessary strictness if we were to say that this was not a valid promissory note; and by holding that the treasurer for the time being is simply inserted as an indication that he, as the agent of the trustees, is authorized to receive payment on their behalf, no uncertainty is introduced into the instrument.

BLACKBURN, J. I am quite of the same opinion. I think the true construction of this instrument is that it merely means: I promise to pay to the trustees, or their agent for the time being (the latter being what is implied by law), and I give notice that the treasurer is such agent. This is carrying out the intimation of Bayley, J., in *Blanckenhagen v. Blundell*, that if there had been any community of interest stated between the payees, so as in any respect to identify the one with the other, it is possible that an action might have been maintained on the note. I quite agree with Mr. Manisty's argument thus far. If I thought the treasurer was named as payee so as to be able to indorse the note had it been payable to order, or to sue upon it, there would have been an uncertainty which would have vitiated it as a promissory note; but this is not the construction which ought to be put on the instrument.

SHEE, J. I agree that the treasurer must be taken to be named as agent.

¹ See *Megginson v. Harper*, 2 C. & M. 322, 4 Tyr. 94; and the judgment in *Storm v. Stirling*, 3 E. & B. 842; 23 L. J. (Q. B.) 301.

LUSH, J. In two of the cases cited, no person was named except the officer for the time being; consequently, of necessity, the officer for the time must have been taken to be meant as the payee; and therefore, as there was no certain person named as payee, the instrument was invalid as a promissory note or bill of exchange. Here the trustees are designated as payees; and the promise is to pay them by their agent for the time being. *Rule refused.*¹

CRUCHLEY v. CLARANCE.

IN THE KING'S BENCH, NOVEMBER 10, 1813.

[Reported in 2 Maule & Selwyn, 90.]

THIS was an action against the defendant as drawer of a bill of exchange for £200; the declaration contained several counts, and in one stated the bill to have been made payable to the order of the plaintiff, and in another to the order of — (thereby meaning to the order of such person as the defendant should cause to be named and inserted in the said bill as payee), and then averred that the defendant caused the name of the plaintiff to be inserted, &c. At the trial before Lord Ellenborough, C. J., at the London sittings after last term, it appeared that the bill had been drawn by the defendant in Jamaica upon one Henry Man of London, the defendant leaving a blank for the name of the payee, and had afterwards been negotiated in this country by one Vashon, who indorsed it to the plaintiff in payment of an old debt, and the plaintiff inserted his own name as the payee. A verdict was found for the plaintiff.

Denman moved to enter a nonsuit or for a new trial, on the ground that the plaintiff had no right to insert his name in the bill; and he said it was distinguishable from *Russell v. Langstaffe*; because there the bill was filled up by one of the original parties.

LORD ELLENBOROUGH, C. J. As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill.

LE BLANC, J. It is the same thing as if the defendant had made the bill payable to bearer.

¹ *Gaytes v. Hibbard*, 5 Biss. 99; *Harlow v. Boswell*, 15 Ill. 56, *accord.* — ED.

BAYLEY, J. The issuing the bill in blank without the name of the payee was an authority to a *bona fide* holder to insert the name. Per curiam. *Rule refused.*¹

KNIGHT v. JONES.

IN THE SUPREME COURT, MICHIGAN, JULY 9, 1870.

[Reported in 21 Michigan Reports, 161.]

ERROR to Wayne Circuit.

This was an action of *assumpsit* brought by Mary Knight, in the Circuit Court for the County of Wayne, against William Jones. The plaintiff declared on the common counts, with a notice annexed to the declaration, that she would give in evidence, as a promissory note under the money counts, an instrument of which the following is a copy:—

“I promise to pay Mary Knight or heirs the sum making four hundred and fifty dollars, on the first day of January, eighteen hundred sixty-eight. WILLIAM JONES.

“DETROIT, Oct. 7, 1867.”

On the trial, the plaintiff offered the writing in evidence; but the defendant objected to its admission on the ground that it was not a promissory note, because it was uncertain as to the amount and as to the payee.

The Circuit Judge sustained the objection, and rejected the writing as inadmissible in evidence. A verdict and judgment having been entered for the defendant, the plaintiff below brings error.

D. B. & H. M. Duffield, for plaintiff in error.

S. Larned and *F. A. Baker*, for defendant in error.

The Court held that the instrument offered in evidence was sufficiently certain as to the sum payable and the payee, to entitle it to be admitted as a promissory note.

*Judgment reversed and a new trial ordered.*¹

¹ *Crutchly v. Mann*, 5 Taunt. 529; *Atwood v. Griffin*, Ry. & M. 425; 2 C. & P. 368, s. c.; *Farmers' Bank v. Horsey*, 2 Houst. 385; *Rich v. Starbuck*, 51 Ind. 87; *Armstrong v. Harshman*, 61 Ind. 52; *Dunham v. Clogg*, 30 Md. 284; *Elliott v. Chesnut*, 30 Md. 562; *Sittig v. Birckestack*, 38 Md. 158; *Aiken v. Cathcart*, 3 Rich. 133; *Brimmel v. Enders*, 18 Grat. 873, *accord.* — ED.

² *Doak v. Robinson*, 1 Han. (N. B.) 279 (*semble*), *accord.*

See *Bacon v. Fitch*, 1 Root, 181.

Conf. Lockwood v. Jesup, 9 Conn. 272. — ED.

COMMONWEALTH v. SAMUEL W. DALLINGER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 25 —
SEPTEMBER 1, 1875.

[*Reported in 118 Massachusetts Reports, 439.*]

INDICTMENT on the Gen. Sts. c. 162, §§ 1, 2, charging the defendant in the first count with falsely making, altering, forging, and counterfeiting, with intent to injure and defraud, a certain promissory note for the payment of money, of the tenor following, that is to say:—

“\$1,000.

BOSTON, May 29, 1874.

“Three months after date, I promise to pay to the order of A. P. Morse one thousand $\frac{90}{100}$ dollars, at any bank in Boston. Value received.
A. P. MORSE.”

The second count charged the uttering and publishing as true, with knowledge that the same was false, forged, altered, and counterfeit, and with intent to injure and defraud, of a promissory note of the same tenor, setting it forth.

The third count charged the false making, altering, forging, and counterfeiting, with intent to injure and defraud, of “a certain indorsement upon a certain false, forged, and counterfeited promissory note for the payment of money, which said note was of the tenor following” (as above set forth), “and which said indorsement was of the tenor following, that is to say, A. P. Morse.”

Trial in the Superior Court before Pitman, J., who allowed a bill of exceptions in substance as follows:—

The government, in support of all the counts in the indictment, offered in evidence a note like the one set forth in the indictment, except that the note so offered had written upon its back “A. P. Morse.” One of the witnesses for the government, to whom the offered note was uttered, testified that the name on the back, A. P. Morse, was there at the time the note was uttered to him by the defendant. The defendant objected to the admission in evidence of the note, as not being the note set forth in the counts of the indictment; but the judge admitted the evidence.

At the close of the evidence of the government, the defendant asked the judge to rule that a verdict of not guilty be rendered by reason of a variance, because the note offered by the government, and admitted in evidence, was not the note, a copy of which purported to be set forth, according to its tenor, in the indictment. The judge declined so to rule.

The defendant asked the judge to rule that a writing, such as set forth in the indictment, could not be the subject of forgery, unless the name of the maker and payee, they being one and the same person,

be indorsed on the back ; and, unless indorsed, the paper was a nullity, not fixing any pecuniary liability upon any one. The judge declined so to rule, and ruled that the writing set forth in the indictment was properly described as a promissory note.

The evidence at the trial was that there was but one A. P. Morse, and he testified that the signature on the note was not his. It appeared that the note was in the hands of the district attorney at the time the grand jury found the bill, and the principal witnesses testified before that body. The defendant offered no evidence. The jury returned a verdict of guilty on all three counts ; and the defendant alleged exceptions.

C. J. Brooks, for the defendant.

W. G. Colburn, Assistant Attorney-General (*C. R. Train*, Attorney-General, with him), for the Commonwealth. *

WELLS, J. It appearing in evidence at the trial that there was but one A. P. Morse, it followed that the writing which purported to be signed by him purported also to be payable to his own order. Such a writing would not constitute a contract, and therefore would not become a promissory note until indorsed by him. With this fact in the case, all the allegations of the first and second counts being sustained by proof, the offence of forgery, or uttering a forged promissory note, would not be made out.

The exceptions must therefore be sustained as to the first and second counts.

The third count is for forging the indorsement of the name of A. P. Morse upon the same note. With that indorsement, it purported to be a valid contract, and was, in form, a promissory note. Both the body of the note and the indorsement are set out in the indictment. The allegation that the defendant forged the indorsement upon a promissory note may well be sustained, although the writing became a promissory note only by means of such indorsement. The principal allegation may be taken to have reference to the character of the instrument when so indorsed. In setting forth the instrument and the indorsement, the designation of the face of the writing as the note may be taken to have been by way of distinction merely, and not as qualifying or limiting the sense of the previous allegation. As to this count, the exceptions are

*Overruled.*¹

¹ " **PARKE, B.** In this case, we think the rule to enter a verdict for the plaintiff should be made absolute. The plaintiff declared on a note for £150 at two months, made by the defendant, and payable to bearer, which the defendant delivered to one J. K. Kent, and Kent indorsed to the plaintiff. The defendant pleaded that he did not make the note. On the trial, the plaintiff produced a note corresponding in date, made by the defendant, whereby he promised to pay to his own order £150 two months after date. The note was indorsed in blank by the

defendant, and afterwards by J. K. Kent. My brother, Channell, objected to the receipt of the note in evidence, on the ground of variance, and that it was not a note within the Statute 3 & 4 Anne, c. 9, and not obligatory as a note; and, if so, that it required a stamp as an agreement, or that the indorsement by Kent made it a new note, so that it required a new note stamp. Lord Denman allowed the objections, reserving the points. On showing cause, the principal question was what the effect of this instrument was as it stood originally before it was indorsed, and whether it was within the Statute 3 & 4 Anne, c. 9, a good and valid note, payable to the order of the maker. The opinion of this court and that of the Queen's Bench as to this point are at variance with one another. In *Flight v. Maclean*, this court held, on special demurrer to the first count of a declaration stating a note payable to the order of the maker, and indorsed to the plaintiff, that the count was bad, such a note not being within the statute of Anne. The case of *Wood v. Mytton* afterwards came on in the Queen's Bench. It was an action on a similar note indorsed to the plaintiff. After verdict for the plaintiff, a motion was made in arrest of judgment; and the court discharged the rule, holding, after a minute examination of all the provisions of the statute of Anne, that such a note was within that statute, and assignable by indorsement. Though these decisions are not at variance, as will be afterwards explained, the construction of the statute by the two courts differs. After a careful perusal of the statute, we must say that we do not think that it ever contemplated the case of notes payable to the maker's order, which are incomplete instruments, and have no binding effect on any one till indorsed. The court of Queen's Bench thought that, though the first part of the first section of the Statute of Anne applied only to notes payable to another person, or his order, or to bearer, which notes it makes obligatory between the parties, yet that the second part applies to every note payable to any person, and therefore includes a note payable to the maker or his order. It appears to us that this is not the meaning of this part of the section, which is, as we think, intended to make those instruments to which it had previously given an obligatory effect between the original parties transferable to third persons, so as to enable them to sue upon them as upon the transfer of bills of exchange. The previous part of the section had given to the payee, when the note was made payable to another person, or to another person or order, and to the bearer, whoever at any time he might be, a right to sue; thus providing entirely for notes payable to bearer, whether in the hands of the original or a subsequent bearer. And then the section proceeds to make a class of notes payable to a person or order transferable. We think that the legislature, by the second part of the section, could only mean to make that instrument, which gave a right to sue, assignable; and no right to sue could exist in any one, in the case of a note payable to the maker's order, until the order was made in the shape of an indorsement: until that indorsement was made, it was an imperfect instrument, and in truth not a promissory note at all, and consequently not transferable under the statute. What, then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and the indorsee, and then, and not till then, it became an assignable note.

"It is well settled that no particular form of words is necessary to constitute a promissory note. If a man draws an instrument in the form of a bill of exchange on himself, and accepts it, it is a promissory note. If he says, 'I pay to A B £100,' and adds an address to the instrument, it may be declared on as a note. What, then, is the meaning of the instrument in question? Before the indorsement, it may be considered to be a promise to pay £150, two months after date, to the person to whom the maker should afterwards, by indorsement, order the amount to be paid,

such indorsement being intended to have the same operation as if put on a complete note. If, then, the indorsement should be to a particular person, or to A B, or his order, it would be a note payable to that person, or to A B or his order (*a*); and if in blank, it would be payable to bearer (*b*) in like manner as a sum secured by a complete note would have been by similar indorsements. It may follow as a consequence that the holder might fill up the blank indorsement by writing over it his own name, and so make it payable to himself, although it is not necessary to determine that point; and, reading the note as payable to bearer, any one may afterwards indorse his own name, and so make himself liable to subsequent holders, as the indorser of a complete note payable to bearer would do. Story on Notes, § 132.

"It appears to us, then, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration.

"This view of the case reconciles the decision of this court in *Flight v. Maclean* with that of the Queen's Bench in *Wood v. Mytton*; but not the reasons given for those decisions. In the case in this court, the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was, in substance, good; for it set out an infartificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff.

"The difference between the two courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd, form are still not invalid; and it might be of much inconvenience if they were; for there is no doubt that this form of note, probably introduced long after the statute of Anne, and for what good reason no one can tell, has become of late years exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them.

"The objection to the stamp, in our view of the case, cannot prevail, as the note was a valid note at two months, payable to bearer as soon as the indorsement was put upon it; and our judgment is that the rule be made absolute." *Hooper v. Williams*, 2 Ex. 18.

(*a*) *Gay v. Lander*, 6 C. B. 336, 363; *Wood v. Mytton*, 10 Q. B. 805; *Scully v. Edwards*, 13 Ark. 24, *accord.* — ED.

(*b*) *Brown v. De Winton*, 6 C. B. 336; *Masters v. Baretto*, 8 C. B. 433; *Absolon v. Marks*, 11 Q. B. 19; *Ennis v. Hastings*, 4 All. (N. B.) 482; *Bigelow v. Colton*, 13 Gray, 309, *accord.* See also *Flight v. McLean*, 16 M. & W. 51; *Lea v. Branch Bank*, 8 Port. 119; *Kayser v. Hall*, 85 Ill. 511; *Pace v. Welmending*, 12 Bush, 141; *Roberts v. Kane*, 64 Me. 108; *Miller v. Weeks*, 22 Pa. 89; *Blackman v. Green*, 24 Vt. 17. (*Conf. U. S. v. White*, 2 Hill, 154, a promise "to pay to the order of the indorser's name," &c.)

But strictly, such notes, even when indorsed in blank, are incomplete, although the holder, by inserting apt words, may make them complete notes payable to bearer, or to a particular person.

A note payable by a firm to one of the partners, or *vice versa*, although not enforceable by the payee at law, but only by his indorsee, is nevertheless a valid security as soon as issued to the payee. *Murdock v. Caruthers*, 21 Ala. 785; *Woodman v. Boothby*, 66 Me. 389; *Richards v. Foster*, 2 All. 527; *Smith v. Lusher*, 5 Cow. 688; *Ormsbee v. Kidder*, 48 Vt. 361. — ED.

SECTION VIII.

A Bill or Note is complete only upon Delivery.

CHAPMAN v. COTTRELL.

IN THE EXCHEQUER, JUNE 3, 1865.

[Reported in 13 Weekly Reporter, 843.¹]

THE defendant was a British subject, residing at Florence. He made and signed at Florence a promissory note in favor of the Union Bank, of London, of which the plaintiff was public officer, and sent the note by post to his brother in London, who delivered it to the bank. The plaintiff, on behalf of the bank, issued a writ according to the 18th section of the Common Law Procedure Act, 1852.

Henry James (*Harington* with him) moved to set aside the writ. The act requires that there should be a cause of action which arose within the jurisdiction; and that means that the whole cause of action should so arise. *Sichel v. Borch*.² And the signature of the note is, at any rate, a part of the cause of action. The making of a note is the same thing as the acceptance of a bill, and where the acceptor of a bill wrote his name in one jurisdiction, and delivered the bill in another, it was held that the cause of action arose in the former jurisdiction. *Roff v. Miller*,³ *Wilde v. Sheridan*; *Story's Conflict of Laws*, § 213. [MARTIN, B., referred to *Cox v. Troy*.] [CHANNELL, B. In the case of a bill, the document is the property of the drawer. It is not so with a note.]

MARTIN, B. I think it is quite clear that this rule must be refused. The facts are these. A gentleman in Florence makes a note, and sends it to his agent in London to be delivered to the payees. Now, upon these facts, I think it quite clear that, in point of law, it continued in his possession just as much as if it was in his pocket until it was delivered, and that till then no contract arose. The case of *Cox v. Troy* is in point. Bayley, J., there says: "The question is, when the drawee comes under an engagement, whether by the act of writing something on the bill, or by the act of communicating what is written to the holder; and I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds

¹ 34 L. J. Ex. 186, s. c. — ED.² 12 W. R. 346; 33 L. J. Ex. 179.³ 19 L. J. C. P. 278.

the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it. But, while it remains in the drawee's hands, it seems to me the acceptance is not fully binding on the person who signed it: and he is at liberty to say, before he parts with it, 'I have not yet entered into an engagement to accept.'" And Holroyd, J., for whose opinion I have the greatest respect, for he was one of the best judges that ever sat on the bench, says the same thing.

BRAMWELL, B. I am of the same opinion, and for the same reasons. There is no pretence for saying that any contract existed, or that the bank acquired any interest in or title to the document till it was delivered to them by the defendant's brother.

CHANNELL, B., concurred.

*Rule refused.*¹

¹ Bell v. Packard, 69 Me. 8 Reporter, 590; Lawrence v. Bassett, 5 All. 150, *accord*.

Similarly when the validity of a bill or note depends upon the time of its execution, the time of its delivery is alone to be considered. Savage v. Aldren, 2 Stark. 232; *Ex parte* Hayward, L. R. 6 Ch. 546; Aldridge v. Branch Bank, 17 Ala. 45; Flanagan v. Mayer, 41 Ala. 132; King v. Fleming, 72 Ill. 21; Dohoney v. Dohoney, 7 Bush, 217; Hilton v. Houghton, 35 Me. 143; Bayley v. Taber, 5 Mass. 286; Hill v. Dunham, 7 Gray, 543; Fritsch v. Heislen, 40 Mo. 555; Clough v. Davis, 9 N. H. 500; Lansing v. Gaine, 2 Johns. 300; Marvin v. McCullum, 20 Johns. 288; Woodford v. Dorwin, 3 Vt. 82; Lovejoy v. Whipple, 18 Vt. 379; Goss v. Whitney, 24 Vt. 187.

It is almost needless to add that no obligation whatever attaches to an undelivered bill or note. Disher v. Disher, 1 P. Wms. 204; Churchill v. Gardner, 7 T. R. 596; Gough v. Findon, 7 Ex. 48; Curtis v. Gorman, 19 Ill. 141; Hunt v. Weir, 29 Ill. 83; Artcher v. Whalen, 1 Wend. 179; Binney v. Plumley, 5 Vt. 500; Chamberlain v. Hopps, 8 Vt. 94; Thomas v. Watkins, 16 Wis. 549; Hillsdale College v. Thomas, 40 Wis. 661.

Nor to a bill or note delivered in the first instance to one who is not the payee, as where B discounts a note payable to A. First Bank v. Strang, 72 Ill. 559; Adams Bank v. Jones, 16 Pick. 574; Prescott v. Brinsley, 6 Cush. 233; Dewey v. Cochran, 4 Jones (N. C.), 184. It has been held, however (1.) that B may sue in such cases in A's name with A's consent. Browning v. Fountain, 1 Duv. 13; Granite Bank v. Ellis, 43 Me. 367; Bank of Newbury v. Rand, 38 N. H. 166; Rutland Bank v. Buck, 5 Wend. 66; Bank of Newbury v. Richards, 35 Vt. 281; or even (2) against A's will; Farnsworth v. Sweet, 5 N. H. 267; Clinton Bank v. Ayer, 16 Oh. 282 (*semble*); Farmers' Bank v. Humphrey, 36 Vt. 554; Trimble v. Bank of Grenada, 10 Miss. 523; or (3) that B may sue not in name of A, but as B, of the name of A. Hunt v. Aldrich, 27 N. H. 31; or (4) under the code that B may sue in his own name as being the real party in interest. Spurrier v. Briggs, 17 Ind. 529; Barrick v. Austin, 21 Barb. 241. — Ed.

SECTION IX.

Ambiguous Instruments.

EDIS v. BURY.

IN THE KING'S BENCH, MAY 4, 1827.

[Reported in 6 Barnewall & Cresswell, 433.]

ASSUMPSIT for sheep, lambs, and cattle, sold and delivered by the plaintiff to the defendant, at his request. Plea: general issue. At the trial before Lord Tenterden, C. J., at the last Middlesex sittings, the plaintiff proved that he had sold to the defendant cattle, to the value of £78 10s.; but it further appeared that the defendant gave the plaintiff in payment of that sum a bill of exchange for £35 2s., which was duly paid, and the following instrument, for £44 11s. 5d., which was not paid:—

“£44 11s. 5d.

LONDON, 5th August, 1826.

“Three months after date, I promise to pay Mr. John Bury, or order, forty-four pounds eleven shillings and five pence, value received.

“J. B. GRUTHEROT,
 “35 Mountague Place,
 “Bedford Square.”

(Indorsed)

JOHN BURY.
 JOHN BURY.”

Grutherot's name was also written across the instrument.

It was contended that this was a bill of exchange, and that the plaintiff was bound to prove that he had given due notice of the dishonor of the bill to defendant. On the other hand, it was insisted that it was a promissory note, and that the defendant, as the maker, was at all events liable upon it as such. Lord Tenterden reserved the point; and the jury found a verdict for the plaintiff.

Campbell now moved to enter a nonsuit. In *Gray v. Milner*, an instrument drawn payable to the drawer or his order, at a particular place, without being addressed to any person by name, but which was afterwards accepted by the person residing at the place where it was made payable, was held to be a bill of exchange; and, in *Allan v. Mawson*,¹ it was held that an instrument which, on common observation, appeared to be a bill of exchange might be treated as such, though words were introduced into it, for the purpose of deception, which might make it a promissory note. There the bill was drawn by Mawson, and contained a request to the drawers to pay; but the

¹ 4 Camp. 115.

word *at* was written, in very small letters, before the names of the drawee; and they refused to pay it. In *Shuttleworth v. Stephens*, it was held that an instrument in the common form of a bill of exchange, except that the word *at* was substituted for *to* before the name of the drawees, might be declared upon as a bill of exchange. Lord Ellenborough, indeed, was of opinion that it might also be pleaded as a promissory note, at the option of the holder. If this were a promissory note, it was unnecessary to insert in it the name of J. B. Grutherot.

LORD TENTERDEN, C. J. This is an instrument, at least, of a very ambiguous character. In form, it is a promissory note; for it contains, in terms, a promise to pay the sum mentioned in it. But then, in the corner of it, there is the name of Grutherot; and it appears that his name is also written across the instrument. In that respect, although it does not, in terms, contain a request to Grutherot to pay, yet it resembles a bill of exchange. It is an instrument, therefore, of an ambiguous nature; and I think that, where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or a bill of exchange. That being so, I think it was competent to the plaintiff in this case to consider this as a promissory note; and, if so, the notice of the dishonor was unnecessary.

BAYLEY, J. I think that this was a promissory note, containing an intimation, on the part of Bury, that he would pay at Grutherot's house; and I think also that, where a party frames his instrument in such a way that it is ambiguous, whether it be a bill of exchange or a promissory note, the party holding it is entitled to treat it either as one or the other, and that the plaintiff ought not to be defeated by the party who framed the instrument being allowed to say that it is a bill of exchange.

HOLROYD, J. It seems to me that it was the design of the drawer of this instrument to hold out to the party taking it that he might treat it either as a bill of exchange or a promissory note. Besides, the words of an instrument are to be taken most strongly against the party using them; and, therefore, if there be any ambiguity in the words of this instrument, they ought to be construed favorably for the plaintiff, and against the defendant, who made the instrument. Besides, until Grutherot put his name to this instrument, it was clearly in terms a promissory note; and, having been once such, the fact of his having afterwards put his name to it as acceptor cannot alter the nature of it.

LITTLEDALE, J. It seems to me that this was a promissory note. It begins with the words, "I promise:" it contains a promise to pay;

and that is the form of a promissory note. But it is alleged that there is something at the foot of the instrument which converts it into a bill of exchange. A bill of exchange, however, is addressed to another person, and contains a request to the drawee to pay the same. In order to make this a bill of exchange, the words "I promise" must be rejected; and those words constitute the essential difference between a bill of exchange and a promissory note. I think that they ought not to be rejected. Suppose they were rejected, could this instrument then have been declared upon as a bill of exchange before Grutherot accepted it? If it could not, then it was not a bill of exchange at that time; and, if it was once a promissory note, Grutherot, by putting his name to it, could not make it a bill of exchange.

*Rule refused.*¹

MILLER v. THOMSON.

IN THE COMMON PLEAS, NOV. 23, 1841.

[Reported in 3 Manning & Granger, 576.]

ASSUMPSIT against the maker of a promissory note for £100, payable to the order of John Cogan Francis at six months after date, and indorsed by Francis to the plaintiff.

The declaration had originally contained a count on a bill of exchange; but, upon a statement that one instrument only existed, the plaintiff was put to his election, and the count on the bill was struck out.

Pleas: first, *non fecit*; secondly, that the note was obtained from the defendant by the fraud and covin of Francis, whereof the plaintiff had notice at the time of the indorsement; thirdly, that the note was so obtained, and was indorsed to the plaintiff without consideration.

At the trial before Tindal, C. J., at the sittings at Westminster after last Hilary term, the following instrument was produced in evidence:—

"LONDON TRADES' JOINT STOCK BANKING COMPANY,

"DORKING, SURREY, 24th Aug., 1839.

"Six months after date, pay, without acceptance, to the order of John Cogan Francis, Esq., £100, value received.

(Signed) "For the Directors.

"THOMAS NEWHAM, *Manager*.

(Addressed) "The London Trades' Joint Stock

Banking Company, 33 Gracechurch Street, London."

¹ *Brazleton v. McMurray*, 44 Ala 323, *accord*.

See *Muldrow v. Caldwell*, 7 Mo. 563. — ED.

The words in italics were in the handwriting of Francis, the remainder being a printed form. Both Francis and the defendant were directors of the company, which had a branch bank at Dorking, of which Newham was the manager.

On the part of the defendant, it was contended that the issue was not proved, inasmuch as the instrument produced was not a promissory note, but a bill of exchange. For the plaintiff, it was urged that the instrument being ambiguous in its form, it might be treated either as a note or as a bill, at the option of the holder; and that supposing it to be necessary, it was competent to the learned judge, under the 3 & 4 Wm. IV. c. 42, § 23, to direct the record to be amended. His lordship ruled that there was no variance between the allegation and the proof, and he also directed that the special matter should be indorsed on the record, whereupon a verdict was taken for the plaintiff; leave being reserved to the defendant to move to enter a nonsuit.

Channell, Serjt., in Easter term last, obtained a rule nisi for entering a nonsuit pursuant to the leave reserved, against which

Sir Thomas Wilde, Serjt., now showed cause. This is an instrument issued by the London Trades' Joint Stock Banking Company, and directed to the company. To this instrument there were no parties except the payee and Thomas Newham, the manager of the bank, who, as representing the directors, is the only party incurring responsibility; which is made more evident by the circumstance of the bill being directed not to be excepted. In a large undertaking, as this was, there would naturally be some partners upon whom the management would more particularly rest; but this does not prevent the act of the managing partner being the act of the partnership. The words "for the directors" mean "by order of the directors." But a bill drawn by a party on himself is nothing more than a promissory note. This was an instrument issued by the same persons who were to pay. [TINDAL, C. J. The whole transaction is by one company.] It is one branch of the firm ordering payment to be made by another branch. The payment is to be made out of the fund of which Newham, the drawer, was the manager. But, if the document is ambiguous, it may be treated either as a bill or a note, at the option of the holder. *Edis v. Bury*. The same point was ruled, upon the authority of that case, by Lord Lyndhurst, C. B., in *Block v. Bell*.

If an amendment were necessary, this case would come distinctly within the powers given by the act. The only difficulty attending it would be the alteration of the plea. [TINDAL, C. J. It will be better to hear the other side on the first point.]

Channell, Serjt., in support of the rule. The bill was drawn in a

different place from that in which it was to be paid.¹ The bank established in London had a branch bank at Dorking. The circumstance of its being to be paid "without acceptance" does not make the instrument less a bill of exchange. *The Queen v. Kinnear*.² [MAULE, J. The holder of a bill is not bound to present it for acceptance. The effect of such a clause in a bill of exchange would probably be to exempt the drawer from liability to pay upon refusal by the drawee to accept. TINDAL, C. J. This company is not incorporated. The instrument in question, supposing it to be a bill of exchange, is a bill drawn by some of the partners upon the firm.] In *Edis v. Bury*, the instrument had all the properties of a promissory note; and in *Block v. Bell* there were the requisites as well of a bill as of a note.

If an amendment were directed, not only must the plea be altered, but an allegation of presentment, or of matter in excuse of presentment, must be introduced.

TINDAL, C. J. It appears that the directors are part of what is described, in the printed words at the foot of the instrument, as "The London Trades' Joint Stock Banking Company." It is an instrument drawn by one of several partners, directing that a sum of money shall be paid by the partnership at a different place. There is an absence of the circumstance of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill of exchange.³ That being so, the only alternative is that this instrument is a promissory note, and is properly declared upon as such.

COLTMAN, J. I am of the same opinion. This instrument must be taken to be signed by the manager on behalf of the company. It is signed by them in the very form set forth in their prospectus.

ERSKINE, J. I am of the same opinion. The instrument is a draft by the company upon that branch of it which is carried on in London. It is, in effect, nothing but a promissory note.

¹ It was formerly essential to the validity of a bill of exchange that it should be payable in a different place from that in which it was drawn. "Il faut qu'il y ait remise d'un lieu à un autre, c'est à dire, qu'on donne dans un lieu pour recevoir dans un autre lieu; cette remise d'un lieu à un autre est ce qui constitue l'essence du contrat de change, dont la lettre de change est l'exécution." Pothier, *Contrat de Change*, No. 30.

² 2 Mood. & Rob. 117.

³ "Il y a trois choses principalement qui constituent l'essence de la lettre de change. 1. Il faut qu'il y soit fait mention de trois personnes; de celle qui tire la lettre, de celle sur qui elle est tiré, et de celle à qui elle est payable." Pothier, *ubi supra*. The second of these conditions has already been set out (*supra*, note 1). The third relates to the special requirements of the French Ordonnance.

MAULE, J. This is a bill drawn by the whole company, acting by their directors, upon the whole company. It is a promise made by one partner acting on behalf of the company, under the order of the directors, that the company shall pay. It is a promise made by the company, at Dorking, to pay in London. It is therefore, in effect, a promissory note.

*Rule discharged.*¹

LLOYD v. JOHN EDWARD OLIVER.

IN THE QUEEN'S BENCH, MAY 4, 1852.

[Reported in 18 Queen's Bench Reports, 471.]

THE first count of the declaration stated that one Henry Oliver, on 17th July, 1851, made his bill of exchange in writing, and delivered it to defendant, and thereby required defendant to pay to plaintiff £99 16s., two months after the date thereof, which period had elapsed before the commencement of this suit; and that defendant accepted the same, and promised plaintiff to pay the same, according to the tenor and effect thereof.

There was a second count, claiming the same sum on an account stated.

Pleas: 1. That defendant did not accept the bill of exchange in the first count mentioned, in manner and form, &c. Issue thereon.

To the second count: *non assumpsit*. Issue thereon.

On the trial before Erle, J., at the London sittings in last Trinity term, the following document was put in evidence by the plaintiff:—

“£99 15s.

LONDON, July 17, 1851.

“Two months after date, I promise to pay to Mr. T. R. Lloyd, or order, the sum of ninety-nine pounds fifteen shillings, for value received.

HENRY OLIVER.

“JOHN EDWARD OLIVER,

“Birmingham.”

Across this was written: “Accepted. Payable Spooner, Attwood, & Co., bankers, London. Edward Oliver.”

¹ Roach v. Ostler, 1 M. & Ry. 120; Dickinson v. Valpy, 5 M. & Ry. 126; Allen v. Sea Ins. Co., 9 C. B. 574; Bailey v. S. W. Bank, 11 Fla. 266; Wardens v. Moore, 1 Ind. 289; Marion R.R. v. Hodge, 9 Ind. 163; Indiana R.R. Co. v. Davis, 20 Ind. 6; Chicago R. R. v. West, 37 Ind. 211; Maux Ferry Co. v. Branegan, 40 Ind. 361; Fairchild v. Ogdensburg R.R. Co., 15 N. Y. 337; Bull v. Sims, 23 N. Y. 570, *accord*.

See Dougal v. Cowles, 5 Day, 511; Cribbs v. Allen, 13 Gray, 597; Gilstrap v. St. Louis R.R. Co., 50 Mo. 491.—ED.

It was proved that "Edward Oliver" was the signature of the defendant.

It was objected, for the defendant, that this document was not a bill of exchange. The learned judge was of opinion that it might be declared upon as such, and directed a verdict for the plaintiff; leave being reserved to move to enter a verdict for the defendant.

J. Gray now moved accordingly. In *Edis v. Bury*, a document like this was held to be not a bill of exchange, but a promissory note. [LORD CAMPBELL, C. J. What the court there held was that it might be treated as a promissory note, if the holder choose.] Little-dale, J., there said that it could not be a bill of exchange. [LORD CAMPBELL, C. J. The document here says, in effect: "I will pay if the party to whom this is addressed does not accept, or if he does not pay after he has accepted." It is a bill of exchange, containing that additional promise to the payee.] There are no words of request. It cannot be said that merely putting John Edward Oliver's name at the bottom of the document is a request to him by the maker of the instrument to pay. [LORD CAMPBELL, C. J. I do not see what else it can mean. CROMPTON, J. The acceptance, at all events, shows the meaning of John Edward Oliver's name being at the bottom of the instrument.] Even if that were so, the instrument could not be a bill of exchange, or any thing but a promissory note, until it had been accepted; but the declaration treats it as if it were a bill of exchange at the time of making.

LORD CAMPBELL, C. J. I am of opinion that this instrument, even before acceptance, might be treated as a bill of exchange as against Henry Oliver, the drawer. As against the defendant, it is clearly a bill of exchange. It is directed to John Edward Oliver. That must mean that John Edward Oliver is requested to pay the sum mentioned at two months after date, although there are no express words of request. The words, "I promise to pay," need not be rejected: they are to be considered as an expression of what otherwise would be implied; namely, that the maker will pay, if the acceptor do not. The instrument is ambiguous, and might, no doubt, if the plaintiff chose, be treated as a promissory note. That is the effect of the decision in *Edis v. Bury*.

ERLE, J. As against the defendant, this instrument is clearly a bill of exchange. We must construe the language of it according to known mercantile usage. It has always been the custom, in drawing bills of exchange, to place the name of the party to whom the bill is directed in that part of the instrument where, in the present case, the name of John Edward Oliver, the defendant, is placed. According to the same rule, the word "accepted," followed by a signature, as in the

present instrument, implies acceptance of the bill by the party signing. I recollect that it was proved at the trial that the instrument had never been out of the hands of the parties to it until it was in its present form; so that it never could have been simply a promissory note, as has been suggested. It is not unjust to presume that it was drawn in this form for the purpose of suing upon it, either as a promissory note or as a bill of exchange.

CROMPTON, J. The instrument contains, in my opinion, a clear direction to John Edward Oliver to pay, and a clear acceptance by him. It is, therefore, a bill of exchange. But it has been decided, and it is most important that the decision should not be impeached, that equivocal instruments of this kind, possessing the character both of promissory notes and of bills of exchange, may be treated as either.¹

Rule refused.²

COMMONWEALTH v. JONATHAN S. BUTTERICK.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1868.

[Reported in 100 Massachusetts Reports, 12.]

INDICTMENT for forging securities for money, and uttering forged securities for money as genuine; containing originally ten counts.³

The first count charged that on March 12, 1866, at Sterling, the defendant "had in his custody and possession a certain bill of exchange for the payment of money," of the following tenor:—

"\$850.

"STERLING, March 12, 1866.

"Three months after date, pay to the order of myself eight hundred and fifty dollars, value received, and charge the same to the account of your obedient servant.

J. S. BUTTERICK."

"To J. S. Butterick, Sterling, Mass."

That "upon the back thereof was then and there written an indorsement thereof of the tenor and effect following, to wit, 'J. S. Butterick;'" and "there was then and there written upon the face of said bill of exchange the following indorsement, to wit, 'Payable at the Lancaster N. Bank, J. S. Butterick;'" and that the defendant "did then and there falsely make, forge and counterfeit, on the back of said bill of exchange, beneath the indorsement of the name of

¹ Wightman, J., was absent.

² See *Forbes v. Marshall*, 3 C. L. R. 983. — ED.

³ Only that part of the case is given which relates to the first count. — ED.

J. S. Butterick on the back of said bill of exchange, an indorsement of said bill of exchange of the tenor and effect following, to wit, 'J. M. Stevenson,' with intent to injure and defraud."

At the trial in the Superior Court, Devens, J., overruled a motion filed by the defendant before the jury were impanelled, to quash this count as not setting forth any offence with due certainty, of which the following are the material parts:—

"Because the first count contains no description or copy of the instrument upon which the forged indorsement is alleged to have been made, inasmuch as said indorsement is alleged to have been made upon a bill of exchange, and the instrument set forth does not purport to be a bill of exchange; because said instrument does not appear, nor can it be, of any legal validity; and because the allegations are contradictory and inconsistent, averring an indorsement to have been made upon the face of the bill."

The jury found the defendant guilty on the first, second, eighth, ninth, and tenth counts; and he alleged exceptions.

G. F. Hoar & G. A. Torrey, for the defendant.

C. Allen, Attorney-General for the Commonwealth.

FOSTER, J. Upon principle as well as by the authorities cited by the attorney-general,¹ we entertain no doubt that an order for the payment of money, drawn by one in his own favor on himself, and by himself accepted and indorsed, may be treated as a bill of exchange, and so described in an indictment. Such instruments are well known in commerce; especially in the case of mercantile firms which have branches in different cities, all composed of the same partners. Perhaps such a bill may also be declared upon as a promissory note. But we agree with the Court of Queen's Bench in the latest English case on the question, decided in 1852, that "it is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or a bill of exchange." *Lloyd v. Oliver*. It is sufficient that the instrument was in the form of, and purported to be, a bill of exchange; and the defendant might be convicted of forging this indorsement, if all the other names were also forged or were those of fictitious personages.²

¹ These authorities being substantially the cases given in the text or cited in the notes of this section, have been omitted. — Ed.

² See *Starke v. Cheeseman*, Carth. 509; *Dehers v. Harriott*, 1 Show. 163; *Robinson v. Bland*, 2 Burr. 1037; *Ex parte Parr*, 18 Ves. 69; *Harvey v. Kay*, 9 B. & C. 364; *Dickenson v. Teague*, 4 Tyrwh. 450; *Randolph v. Parish*, 9 Port. 76; *Wetumpka R. R. v. Bingham*, 5 Ala. 662; *Kankaskia Bridge Co. v. Shannon*, 6 Ill. 15; *State v. Bowers*, 8 Blackf. 72; *Burnheisel v. Field*, 17 Ind. 609; *Cunningham v. Wardwell*, 12 Me. 466; *Hasey v. Sugar Co.*, 1 Doug. (Mich.) 193. — Ed.

PLACE OF PAYMENT. By the Continental law the place of the drawee or maker is an indispensable requisite to a bill or note, and the place so named is the proper place for presentment, unless the instrument is expressly made payable at a different place. In some countries also, a drawer or indorser is not entitled to notice unless he indicates on the instrument the place to which notice shall be sent. But in England and the United States the place of the drawee or maker or drawer or indorser need not be given, and, even if given, is not the proper place for presentment, or service of notice, unless it is actually the place of business or residence of the respective parties.

See Index — Place of Presentment and Place of Serving Notice.

Conf. *Turnbull v. Thomas*, 1 Hughes, 172; *King v. Vance*, 46 Ind. 246; *Campbell v. Farmers' Bank*, 10 Bush, 152.

STAMPS. For the requirements of the English statutes, see Byles, Bills (11th ed.), 102-116. In the United States, a tax of two cents is imposed upon "every bank-check, draft, or order for the payment of money, drawn upon any bank, banker, or trust company, at sight or on demand." U. S. Rev. St. § 3418.

DATE. A date in a bill or note is required only for the purpose of fixing the time of payment. Accordingly, a bill or note may be antedated or postdated. *Passmore v. North*, 13 East, 517; *Brewster v. McCardel*, 8 Wend. 478; *Godin v. Bank of Commonwealth*, 6 Duer, 76; *Walker v. Geisse*, 4 Whart. 252; *Bumpass v. Timmins*, 3 Sneed, 459; or if the time of payment is otherwise indicated, no date whatever is necessary. Even when the date is omitted in a bill or note payable at a fixed period after date, the instrument is not on that account unnegotiable, for any holder who is willing to receive such an instrument may fill up the blank, with the date of the issue. See *Mitchell v. Culver*, *infra*, 733, where indeed the holder acting under the direction of his vendor was permitted to antedate the note.

In pleading, if the date of the bill is not set forth, it will be intended to be the same as the date of the alleged making or drawing. *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, 3 B. & P. 173; *Giles v. Bourne*, 6 M. & Sel. 573; *Seldonridge v. Connable*, 33 Ind. 375.

FORM OF SIGNATURE. The signature of a party to a bill or note may be by his initials. *Merchant's Bank v. Spicer*, 6 Wend. 443; *Palmer v. Stephens*, 1 Den. 471; or by figures; *e. g.* "1. 2. 8"; *Brown v. Butcher's Bank*, 6 Hill, 443; or by a mark; *George v. Surrey, M. & M.* 516; *Hilborn v. Alford*, 22 Cal. 482; *Shank v. Butsch*, 28 Ind. 19; *Willoughby v. Moulton*, 47 N. H. 205. The signature may be printed. *Pennington v. Baehr*, 48 Cal. 565.

MATERIAL REQUISITES OF BILLS AND NOTES. A bill or note is almost invariably written in ink, upon paper, but there would seem to be no legal objection to the use of other materials. Byles, Bills (11th ed.), 76; *Geary v. Physic*, 5 B. & C. 234; *Brown v. Butcher's Bank*, 6 Hill, 443; *Reed v. Roark*, 14 Tex. 329; *Closson v. Stearns*, 4 Vt. 11. — Ed.

CHAPTER II.

ACCEPTANCE.

SECTION I.

An Acceptance should import a Promise to pay according to the Tenor of the Bill.

ANONYMOUS.

SITTINGS IN LONDON, CORAM LORD HOLT, C. J., DEC. 2, 1696.

[*Reported in Comberbach, 401.*]

PER HOLT, CH. Where a bill of exchange is payable to a man's order, — that is, to himself, — if he makes no order, and if the party underwrites the bill, presented such a day, or only the day of the month, it is such an acknowledgment of the bill as amounts to an acceptance. And this by the jurors was declared to be the common practice.¹

PETIT v. BENSON.

TRINITY TERM, 1697.

[*Reported in Comberbach, 452.*]

A BILL was drawn upon the defendant, who accepts it by indorsement, in this manner: "I do accept this bill to be paid, half in money and half in bills." And the question was, whether there could be a qualification of an acceptance; for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum. But it was proved by divers merchants that the custom among them was quite otherwise, and that there might be a qualification of an acceptance; for he that may refuse the bill totally may accept it in part. But he to whom the bill is due may refuse such acceptance, and pro-

¹ See *Hunter v. Cobb*, 1 Bush, 239. — ED.

test it so as to charge the first drawer ; and though there be an acceptance, yet after that he hath the same liberty of charging the first drawer as he before had.¹

¹ *Wegersloff v. Keene*, 1 Stra. 214, *accord*.

In this case, the objections to sanctioning the practice of giving partial acceptances were forcibly presented in the notable argument of Strange, of counsel for the defendant. The material parts of his argument are contained in the following extract :—

“ The single point which will arise upon this case is, whether a partial acceptance be good or not within the custom of merchants. And I shall endeavor to prove that this acceptance is a void acceptance, and consequently the plaintiff has no cause of action.

“ That I may not be misunderstood when I call this a void acceptance, I would premise that I do not mean it is so absolutely void as to exclude any remedy against the acceptor, for I must admit that this acceptance will create a contract between the parties, upon which an action upon the case would have laid. But what I shall insist upon is that this is a void acceptance within the custom of merchants, upon which the plaintiff has founded his case ; and if it be void within the custom of merchants, then whatever effect it would have as a private contract between the parties will be a matter foreign to the present question, inasmuch as the plaintiff has not relied on it as such, but has brought his action upon the custom.

“ I have inquired into the practice of merchants in this case, but have not been able to get any certain account of this matter, the true reason of which I apprehend to be that it is a case which seldom or never happens amongst merchants ; for they honor one another's bills, though there are no effects of the drawers in their hands ; and they would esteem it the greatest blemish that could be cast upon them, if their correspondent should once refuse to answer their bills any further than they had effects in his hands.

“ What account I have received, I shall submit to the court. Some are of opinion that an acceptance for part is an acceptance for the whole ; inasmuch as it deprives the party of the benefit of protesting, and so resorting back to the drawer. But I apprehend there is no reason at all for this. To say that, because commonly a man does honor another's bill beyond what effects he has in his hands, that therefore he must do it, is a strange conclusion. For suppose he has but £20 of the drawer's in his hands, and is bound to answer a bill for so much, it would be highly unreasonable that, in case the other should draw for £10,000, this man must either pay the whole or subject himself to an action for non-performance of the condition.

“ But, if this notion should prevail, that an acceptance for part is an acceptance for the whole ; yet as, on the one hand, it charges the acceptor with the entire sum, so, on the other hand, it discharges him of this action. For then there can be no color to split the demand into two actions ; but the plaintiff, in declaring for part, ought to show that the rest is satisfied. *Salk.* 65.

“ Others are of opinion that the party ought not to have taken this acceptance, but protested the bill as to the whole, and sent for another to the value of what the drawee would answer. This likewise makes for the acceptor the defendant.

“ I am informed, indeed, there is one gentleman does attend to say that this matter has happened in his own experience ; but he, by what I find, is alone in that opinion, and perhaps may not have considered the consequences of it.

“ As there is this diversity of opinions upon a matter which seldom or never comes

in practice, I shall take it upon the reason of the thing, with a view likewise to the many inconveniences which will follow as a consequence of establishing this partial acceptance.

"The better to come at this, it may not be improper to state the method of transacting these affairs. When the party to whom a bill of exchange is made payable receives it, he immediately applies to the drawee to get his acceptance. If he accepts it, nothing farther is done till the day of payment; and then, if it be paid, the matter is at an end. But, if the drawee will not accept it, then the party is to protest the bill, and send back the protest by the next post. When the time of payment comes, he tenders the bill again; and then the drawee may either pay it or refuse it. If he refuses it, then there is a second protest for non-payment, and the bill itself is returned; and so it is if he accepts it, and afterwards refuses to pay it. From all this, I would infer that there can be no partial protest for non-acceptance; which, as I am informed, is a protest not in the memory of any but one of the notaries public. The words of all protests are: 'I exhibited the original bill to the person to whom directed, and demanded his acceptance thereof.' Now an acceptance of part is not an acceptance thereof, no more than payment of part is a payment of the whole. There is a book which goes by the name of 'Advice concerning Bills of Exchange,' and is esteemed amongst those who are most conversant in these affairs. And, in fol. 33 of that book, it is said that nothing but an acceptance to pay *secundum tenorem billæ* can deprive the party of the benefit of a protest; and, in fol. 16 of the same book, he puts the case of a bill drawn on A and B, who are not joint-traders, and an acceptance by one only. 'This,' says he, 'goes for nothing; and the party must protest the bill, as in case of no acceptance.' These are the words of the book; and, by putting the case of two who are not joint-traders, I should apprehend he means that, each being charged with a moiety, the acceptance of one is but an acceptance to pay a moiety, which is but a partial acceptance, and therefore void; and this is explained by the case of *Pinkney v. Hall*, Salk. 126, where one joint-trader accepted a bill, and it was held to be the acceptance of both, because both were equally liable to pay the whole. And to this purpose likewise is *Molloy's 'De Jure Maritimo,'* in the chapter concerning bills of exchange.

"If there can be no protest for non-acceptance of part, I would consider how the case would stand in regard to allowing this partial acceptance. The natural and plain consequence of that will be to put it in the power of the drawee to defeat the other of the benefit of protesting a bill for £10,000 by his acceptance to pay one penny only. For this, I would submit that, if the party *may* take such an acceptance, he *must* take it. If it will be good, he cannot refuse it; for it is not at his election to charge the drawer, but upon the other's default. The drawee is the person he must first resort to; and, if he refuses, then, and not till then, is there a proper remedy against the drawer; and therefore, in the action against the drawer, the plaintiff must show a protest, which is an endeavor to receive the money of the drawee. Salk. 131.

"But even admitting there may be a partial protest for non-acceptance, yet the inconveniences which will follow, of course, are so great that I hope it shall never be established by the judgment of the court.

"It would be endless to put cases where it has been held that rent-charges and the like cannot be apportioned; and therefore I shall rely entirely upon the reason of the thing, that in this case the contract between the drawer and the person to whom the bill is payable is entire, and not divisible. By this contract, the drawer (and, consequently, the indorsor) subjects himself to an action, if the money be not paid at the time. But though he becomes liable to one action, yet there is no reason that, by transactions between the party to whom the bill is payable and the drawee, to

which he is not privy, this contract should be branched out into several actions, which will unavoidably be the case of every partial acceptance; for I do not apprehend how this can be reduced to one action by refusing this partial acceptance, and protesting for the whole; because (as I observed before), if the party *may* take it, he *must* take it, and can charge the drawer no farther than there is a default in the drawee.

“As, therefore, two actions are the fewest he can be charged with, I would beg leave to instance how he may be charged with a great many: The acceptor will charge him as far as his undertaking; then another for the honor of the drawer (as is usual amongst merchants) may undertake for another part, and, by the same reason, a third and a fourth; and nobody can say where it shall stop. So many different persons may accept for so many different pence; and every one of these has his distinct remedy against the drawer.

“Another inconvenience, which naturally occurs upon this occasion, is that the drawee will insist to have the whole bill delivered up, when he pays but a part only. For, according to the authors who treat of this subject, he can never charge the drawer, when they come to make up their accounts, with more than he has vouchers for under the hand of the drawer. In ‘*Lex Mercatoria*,’ 274, it is said that, if the bill be lost, the drawee cannot justify the payment, though he has a letter of advice. And this refutes all the expedients of indorsing part, or giving a special receipt for so much; because, in neither of those cases, will the drawee have any authority to produce under the hand of the drawer. If the drawer then refuses to allow what the other has paid, his only remedy will be to bring his action. And how he will be to maintain it upon the custom of merchants, I must confess myself at a loss to find out; for he will want the necessary evidence to maintain such an action, which is the bill itself that was drawn upon him.

“If this, then, will be the case where he pays the money without taking up the bill, I must contend that, by all the rules of prudence and justice, he may insist to have the whole bill delivered up to him, when he only pays part of it, according to his acceptance.

“Supposing him, then, in possession of the whole bill, I would consider in what a condition we have left the party to whom it was made payable. He must be supposed to have advanced a consideration adequate to the whole sum, and consequently is, in justice, entitled to his whole money of somebody or other. It will be said that he may get what he can of the drawee, and then go back to the drawer for the residue. It is true, he may do so; and the drawer may be a man of so much honor as to pay him every farthing. But what must he do, when he finds he is mistaken in his man; when the drawer, instead of ordering him the money, as he expected, shall tell him: No, you have nothing to produce under my hand; and, if you have been so foolish as to deliver up the bill, you must take it for your pains. I know of no remedy in this case but what would be worse than the disease; and, therefore, the most prudent thing he can do will be to sit down by the loss.”

“And this will be so far from being a trick in the drawer, that it will be no more than what every prudent man will do. For if, upon the report of what has been done, he should advance the residue of the money, yet still there is a bill standing out against him for the whole, upon which bill it cannot appear he has paid the money which the drawee had left unpaid. And whether, in that case, he would not afterwards be answerable for the whole, may be proper to be considered.

“I have now done with what I had to offer in maintenance of the negative of the question I proposed to speak to, and shall therefore proceed to take notice of what was hinted at upon the former argument in behalf of the plaintiff in this case.

"It was said that the drawee may, and very often does, accept to pay the money at a different time from what is appointed in the bill. I must admit he may do so; but surely that case can bear no proportion to this case. It is not liable to any of the inconveniences I mentioned: it is the same as if the bill had at first given him a longer time; and it is well known that, after acceptance, a month or two will break no squares where the man is good,—with this further, that amongst merchants such an acceptance is esteemed a general acceptance to pay the money, according to the tenor of the bill. Besides, Molloy says that, in such a case, the bill must be protested, which cannot be done in our case.

"It was further urged to be highly reasonable that the drawee should honor the bill as far as he had effects. I admit this to be reasonable; and perhaps it would not have been impossible for the plaintiff to have declared in such a manner as to have charged the defendant to the amount of his acceptance. But we are here upon the custom of merchants; and whatever might be reasonable in case of private property will cease to be so when it appears to be pregnant of so many inconveniences to the public as I have mentioned; and, if the plaintiff has it in his power to frame a case wherein he may do himself justice, that makes the argument stronger against suffering him to break in upon the public convenience for his private benefit. The policy of the law is rather to let one man suffer than to introduce a general inconvenience. But here we are to be led into the greatest inconveniences,—even in a case where there is no danger of the party's suffering in the least; for he has a remedy which stands clear of all these inconveniences, and there will be no harm in leaving him to that.

"It was said that if the drawer (who is supposed to know what effects he has in the other's hands), by drawing for more, subjects himself to several actions, it is his own fault. The answer to this is, that the very drawing for more destroys the presumption that he knew how accounts stood. But amongst merchants, as I observed before, that is not the case; for they often honor one another's bills, where there are no effects at all.

"But even admitting the drawer does not stand altogether clear of this objection, yet still this may be the case of one who cannot be supposed to know how the account stood between the drawer and the drawee; for it may happen this bill may be indorsed; and then the indorser is to be charged in the same manner as the drawer. The indorser will be liable to several actions, though he is no ways privy to any of the transactions between the indorsee and the drawee.

"Upon breaking the case upon the former argument, a difference was taken between the case of the acceptor and that of any other person: that he should not come and discharge himself against his own acceptance, whatever the other might have done as to refusing this partial acceptance. If this was his case only, it might be reasonable to extend this acceptance as far as it will go; but the hardship is, that what is law in his case must likewise be law in the case of the drawer and indorser; so that there are two innocent persons who are to be involved in the same common fate; and that is never to be suffered,—especially when the drawee may be charged in another name, which will not affect the drawer or indorser."

If a holder is content to take an acceptance varying from the tenor of the bill, he thereby discharges the drawer and indorsers, unless they, upon due notice of the qualified acceptance, assent thereto. *Sebag v. Abithol*, 4 M. & Sel. 462, 466 (*semble*); *Rowe v. Young*, *infra*, Vol. II. p. 23, n. 2; *Whitehead v. Walker*, *infra*, Vol. II. p. 144; *Walker v. Bank of the State*, 13 Barb. 636; 5 Seld. 582, s. c.; *Troy Bank v. Lauman*, 19 N. Y. 477 (*semble*). See *Niagara Bank v. Manufacturing Co.*, *infra*, Vol. II. p. 347.

JACKSON v. PIGOTT.

IN THE KING'S BENCH, MICHAELMAS TERM, 1699.

[Reported in 1 Lord Raymond, 364.]

ASSUMPSIT upon a bill of exchange. The plaintiff declares that J. S. drew a bill of exchange upon the defendant, dated the 25th of March, 1696, payable within one month after; that afterwards, viz., such a day in April, 1697, he showed the bill to the defendant, and he promised to pay it *secundum tenorem et effectum billæ prædictæ*. *Non assumpsit* pleaded; and verdict for the plaintiff.

Sir Bartholomew Shower moved, in arrest of judgment, that the promise was void, because impossible to be performed, the day of payment being past at the time of the acceptance of the bill, and so impossible to be performed *secundum tenorem et effectum billæ prædictæ*; all which appears upon the plaintiff's declaration.

To which *Mr. Northey*, for the plaintiff, answered that it will amount to a promise to pay generally. Of which opinion was the whole court. And

HOLT, C. J., took the distinction, where the day of payment is past at the time of the acceptance, as it was in this case, and where the day of payment is to come: in the former case, acceptance to pay *secundum tenorem et effectum billæ* will amount to a general acceptance to pay the money; *contra*, in the latter case. For in the former case it is impossible to pay the money as the bill appoints. But, he said, that it had been better in this case to have declared of a general promise, without having restrained it by the *tenorem et effectum billæ*. And (by him) in such case the acceptance of a bill amounts to an express promise to pay it. But (by him) if the plaintiff declares that the acceptance was before the day appointed for the payment, and that he accepted to pay it *secundum tenorem et effectum billæ prædictæ*, and it appears upon the evidence that the acceptance in fact was after the day of payment, that would be against the plaintiff.

*Judgment for the plaintiff.*¹

¹ *Mutford v. Walcot*, 1 Ld. Ray. 574; *Billing v. Devaux*, 3 M. & Gr. 565; *Christie v. Peart*, 7 M. & W. 491; *Stockwell v. Bramble*, 3 Ind. 428; *Williams v. Winans*, 2 Green, 339, *accord*.

A bill may be accepted although previously dishonored by the drawee's refusal to accept. *Wynne v. Raikes*, *infra*, p. 174; *Stockwell v. Bramble*, 3 Ind. 428; *Grant v. Shaw*, 16 Mass. 344. — ED.

WALKER v. ATWOOD.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1708.

[Reported in 11 Modern Reports, 190.]

AN action was brought on a bill of exchange. The bill was drawn the 8th of April, 1707, upon Atwood, to pay £15 to Godfrey; the bill being shown to Atwood, he promised to pay it on the 18th of April, 1707. Afterwards this bill was assigned to Walker, who brought this action, and declared on the custom, &c.

Upon a demurrer to the declaration,

Mr. Salkeld for the defendant said, that the bill being to pay a sum of money, and no day said when it should be paid, it must be paid on sight; therefore this promise to pay two or three months after, viz., the 8th of September, is a new agreement, and consequently the action must be founded on the new agreement, and not upon the custom of merchants.

POWELL, J. The custom of merchants is by the acceptance, and a promise to pay at such a time is good, and he is bound by the custom of merchants, by acceptance, to pay at the time appointed, and therefore the plaintiff has declared well on the custom of merchants; and if it should not bind him on the custom, it would not at all, because no *indebitatus assumpsit* lies on the acceptance.

*Judgment was given for the plaintiff, nisi.*¹

SMITH v. ABBOT.

IN THE KING'S BENCH, EASTER TERM, 1741.

[Reported in 2 Strange, 1152.]

THE defendant accepted a bill of exchange to pay it when goods consigned to him, and for which the bill was drawn, were sold. And the plaintiff counted upon the custom of merchants. After a verdict

¹ "The bill as drawn called upon him to pay in money on the 28th May, 1840; but it was competent to him by his acceptance to extend the time of payment, subject to an option in the holder to take such acceptance and agree to such alteration, or to treat the bill as dishonored by non-acceptance." *Per* Patterson, J., delivering the opinion of the court in *Russell v. Phillips*, 14 Q. B. 900. See also *Fanshawe v. Peet*, 2 H. & N. 1; *Kenner v. Creditors*, 7 Mart. n. s. 540; *Peck v. Cochran*, 7 Pick. 34; *Clarke v. Gordon*, 3 Rich. 311. — ED.

for the plaintiff, it was moved in arrest of judgment that this acceptance depending upon the contingency of the sale of the goods was not within the custom of merchants, or negotiable. But the court, upon consideration, held it good. For though the plaintiff might have refused to take such an acceptance, and have protested the bill, yet nobody can say he might not submit to it. And it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods: a man who is drawn upon to pay, at ten days' sight may accept for thirty (Molloy, 304), though the other might protest the bill. Salk. 129; Comb. 452.¹

MOOR v. WHITHY.

IN THE KING'S BENCH, TRINITY TERM, 1770.

[Reported in *Buller's Nisi Prius*, 270.]

A BILL was drawn as follows:—

“TO MR. R. WHITHY.

“SIR,— Please pay to Mr. Scot, or order, £30.

“THO. NEWTON.”

Scot indorsed it to the plaintiff, who presented the bill to the drawee for acceptance, and the defendant (the drawee) underwrites thus:—

“MR. JACKSON,— Please to pay this note, and charge it to Mr. Newton's account. R. WHITHY.”

It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor.² It was only a direction to Jackson to pay £30 out of a particular fund; and, if there were no such fund, the money was not to be paid. But *per Curiam*. The

¹ Cox v. Coleman, Bayley, Bills (6 ed.), 176; Julian v. Shobrooke, 2 Wils. 9; Pierson v. Dunlop, Cowp. 571; Miln v. Prest, 4 Camp. 393; Mendizabal v. Machado, 3 M. & Sc. 841; 6 C. & P. 218, s. c.; Smith v. Vertue, 9 C. B. n. s. 214; United States Bank v. Nat. Bank, 15 Pet. 277; Swansey v. Breck, 10 Ala. 533; Brabazon v. Seymour, 42 Conn. 551; Phillips v. Frost, 29 Me. 77; Stevens v. Androscoggin Co., 62 Me. 498; Grant v. Shaw, 16 Mass. 341; Knox v. Reeside, 1 Miles, 294; Walker v. Lide, 1 Rich. 249; Hunton v. Ingraham, 1 Strob. 271, *accord*.

Conf. Wilkinson v. Lutwidge, 1 Stra. 648; Tassey v. Church, 4 W. & S. 346. — ED.

² Any words written on a bill, which do not negative the drawer's request, will amount to an acceptance, and the drawer need not sign his name. Anon., 1 Comb. 401; Powell v. Monnier, 1 Atk. 611.

underwriting is a direction to Jackson to pay the sum; and it signifies not to what account it is to be placed when paid. That is a transaction between them two only; and this is clearly a sufficient acceptance.¹

POWELL v. JONES.

AT NISI PRIUS, CORAM LORD KENYON, C. J., MAY 29, 1793.

[Reported in 1 *Espinasse*, 17.]

THIS was an action against the defendant as the acceptor of a bill of exchange drawn from Dominica.

The defendant pleaded the general issue, and relied that he had never accepted the bill in question.

The acceptance, as proved by the witness on the part of the plaintiff, was in this manner: The bill was left with the defendant for acceptance by the plaintiff's clerk. The next day, he called for the bill, when the defendant returned it, saying, "There is your bill: it is all right." This the counsel for the plaintiff contended was a sufficient parol acceptance to bind him.

LORD KENYON ruled that these words could by no implication amount to an acceptance; that they conveyed no evidence of the defendant's intention to bind himself to the payment of the bill at all events, which was necessary for the purpose of charging him as acceptor. He therefore directed the plaintiff to be called.²

¹ *Harper v. West*, 1 Cranch, C. C. 192, *accord*.

Conf. Smith v. Nissen, 1 T. R. 269; *Robson v. Bennett*, 2 Taunt. 388; *Brannin v. Henderson*, 12 B. Mon. 61; *Rutland Bank v. Woodruff*, 34 Vt. 89. — ED.

² See *Sayer v. Kitchen*, 1 Esp. 209; *Anderson v. Heath*, 4 M. & S. 303; *Reynolds v. Peto*, 11 Ex. 418; *Bassett v. Haines*, 9 Cal. 260; *Phillips v. Frost*, 29 Me. 77; *Walker v. Lide*, 1 Rich. 249; *Martin v. Bacon*, 2 Mill, C. R. 132, in which cases the words or acts of the defendant when the bill was presented to him were held not to amount to a parol acceptance.

Conf. Allen v. Williams, 12 Pick. 297. — ED.

BOEHM v. GARCIAS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS AFTER
MICHAELMAS TERM, 1806.

[Reported in 1 Campbell, 425, note.]

ACTION on a bill drawn on Lisbon, "payable in *effective*, and not in *vals reals*." The defendant was the drawer of the bill; and the question was, whether it had been dishonored for non-acceptance. The drawees offered to accept it, payable in *vals denaros*, another sort of currency, which was refused. The defendant now proposed to show that *vals denaros* was sufficient to answer what was meant by "*effective*." But

Per LORD ELLENBOROUGH. The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in *denaros* might not have satisfied the term "*effective*," an acceptance to pay in *denaros* was not a sufficient acceptance of a bill drawn payable in "*effective*." The drawees ought to have accepted generally, and an action being brought against them on the general acceptance, the question would properly have arisen as to the meaning of the term.

ANDERSON v. HICK AND OTHERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., FEB. 14, 1812.

[Reported in 3 Campbell, 179.]

THIS was an action against the defendants as acceptors of a bill of exchange drawn upon them by A. & J. Deykin, payable to the plaintiff.

The defendants denied that they had accepted the bill.

A witness swore that the bill, having been left for acceptance at the defendants' counting-house, was returned unaccepted, as Mr. Keates, one of the defendants, who superintended the account between them and the drawers, had been absent; that, soon after, the plaintiff met Keates in the street, and expressed some surprise that the bill had not been accepted; and that Keates then said, "If you will send it to the counting-house again, I will give directions for its being accepted."

The plaintiff could not prove that the bill was again sent to the defendants' counting-house.

Park, for the plaintiff, contended that Keates's words, importing a promise to accept, were, in law, of themselves an acceptance.

LORD ELLENBOROUGH. This was only a conditional promise to accept, and could not operate as an acceptance till the bill was sent back to the counting-house. *Plaintiff nonsuited.*¹

LANGSTON AND OTHERS v. CORNEY AND OTHERS.

AT NISI PRIUS, CORAM GIBBS, C. J., MARCH 1, 1815.

[Reported in 4 *Campbell*, 176.]

THE plaintiffs declared in the usual form as indorsees, against the defendants as acceptors, of a bill of exchange for £1,500, drawn by Hughes & Co.²

The defendants had effected a policy of insurance in their own names for the drawers of the bill, who were resident in the Isle of France. A loss happened, but the underwriters refused to settle it, on the ground that the voyage was illegal. The bill of exchange was presented for acceptance to the defendants, first by a person of the name of Stewart, who then held it as indorsee, and afterwards by the plaintiffs; upon which occasions the defendants said they could not then accept the bill, as they had no funds of the drawers in their hands, but that, as soon as the underwriters had settled the loss, it should be paid. The plaintiffs now proved that, upon a submission to arbitration, the arbitrator had awarded that the underwriters were liable, and that the defendants had received upon the policy £890 beyond all charges and expenses.

It was contended that under these circumstances the defendants were liable as acceptors of the bill, the condition on which they promised to pay it having been fulfilled; and therefore the case stood the same as if there had been an absolute promise to accept, which has been often held to amount to an acceptance.

¹ *Mason v. Hunt*, 1 Doug. 297; *Swan v. Cox*, 1 Marsh. 176; *Read v. Wilkinson*, 2 Wash. C. C. 514; *Andrews v. Baggs*, Minor, 173; *Liggett v. Weed*, 7 Kans. 273; *Campbell v. Pettengill*, 7 Me. 126; *Grant v. Shaw*, 16 Mass. 341; *Ford v. Angelrodt*, 37 Mo. 50; *Wintermute v. Post*, 4 Zab. 420; *Kellogg v. Lawrence*, Hill & Den. 332; *Browne v. Coit*, 1 McC. 408; *Owen v. Iglanor*, 4 Coldw. 15, *accord.* — Ed.

² Only so much of the case is given as relates to the question of acceptance. — Ed.

GIBBS, C. J. It is alleged in the declaration that the defendants accepted the bill of exchange according to the custom of merchants. What is proved amounts only to a conditional acceptance, and it has never been held that a conditional acceptance can be declared upon as an absolute one. I am therefore of opinion that the plaintiffs cannot recover upon the bill.¹

JEUNE v. WARD.

IN THE KING'S BENCH, MAY 30, 1818.

[*Reported in 2 Barnewall & Alderson, 653.*]

ACTION against defendant as acceptor of a bill of exchange for £150, drawn by J. G., upon the defendant, in favor of the plaintiff Jeune. At the trial at the London sittings after Hilary term, before Lord Ellenborough, C. J., it appeared that the defendant, together with another person of the name of Stubbin, was the co-executor of the will of a Mrs. Leake, under which the drawer Godfrey was entitled to a legacy of £200 on his coming of age. In consequence of this, Godfrey, on the 28th May, 1817, drew the bill on defendant in favor of the plaintiff, as a payment of his bill for goods sold and delivered. The plaintiff, who lived in London, went over, on the 29th May, to the defendant's house in the country, with the bill, and there left it for the purpose of being accepted; but it did not very clearly appear what then passed between the plaintiff and the defendant. At a subsequent period, however, in June, the plaintiff called on Mr. Egerton, the agent for the defendant in London, and introduced himself to him by producing a letter from the defendant, and begged his assistance towards enabling him to obtain payment of the bill from the drawer. He then stated that he had been before with the bill to the defendant, and that the defendant had refused to accept it. Mr. Egerton told him that defendant had done very right in refusing to accept the bill; that Godfrey was, on the 5th July, to receive his legacy, and that he recommended plaintiff then to attend in order to secure the payment of the bill. Accordingly, on the 5th July, the plaintiff attended; but, owing to some dispute as to the stamp for the receipt of the legacy, it was not paid on that day, Godfrey then refusing to receive it. It was afterwards paid to him. The plaintiff gave also in evidence a letter of the defendant's, in answer to an ap-

¹ Ralli v. Sarell, 1 D. & Ry. N. P. 33, *accord*.

See Siggers v. Nicholls, 3 Jur. 341. — *Ed.*

plication for the bill, which stated that, having been applied to by the mother of the drawer to give up the bill to them, which during all this period had remained in his hands, he had, to avoid further trouble, destroyed it. This case having been proved, Lord Ellenborough, C. J., was of opinion, that it amounted in law to an acceptance of the bill by the defendant; and directed the jury to find a verdict for the plaintiff.

Topping having in last term obtained a rule nisi for setting aside this verdict, and for a new trial,

Gurney now showed cause. This conduct of the defendant amounted to an acceptance. For, first, he retained the bill beyond a reasonable time. The bill was left with him for acceptance on 29th May, and it remained with him till 9th July, when the defendant destroyed it. The principle laid down in *Harvey v. Martin*¹ must govern this case. The retaining of this bill, which was left for acceptance, for so long a period, makes the defendant liable. And, besides, there is here the additional fact of the destruction of the bill. By that act the defendant prevented the plaintiff from ever suing the drawer. That falls within the case of *Trimmer v. Oddy*,² where Lord Kenyon lays it down, that if a party put upon a bill that which essentially injures and defaces it, that makes him liable as acceptor. Here the case is much stronger, for the party has not merely defaced and essentially injured the bill, but has actually destroyed it. The verdict, therefore, is right.

Topping and *Gaselee*, in support of the rule. There is one fact which materially distinguishes this case from all those which have been cited, — viz., that here there is an absolute refusal to accept, given originally by the defendant; and no case can be found where, after such refusal to accept, a retaining of the bill has been held to be an acceptance. In *Harvey v. Martin*, the judgment of the court turns entirely on the ground of the usual course of dealing between the parties, there having been instructions to transmit the bills, &c., when

¹ Sittings after Michaelmas Term, 47 Geo. III. Action on bill of exchange, by payee against acceptor. Plaintiff transmitted the bill by post to defendant, the drawee, as soon as he received it, desiring him to accept and hand it over to plaintiff's agent in London, which was the usual mode of dealing between the parties. Plaintiff, hearing nothing of his bill from his agent, wrote to defendant, remonstrating with him for the delay. The defendant answered that he had retained the bill because he had once meant to accept it, which he now declined doing.

LORD ELLENBOROUGH. This is clearly an acceptance. If a bill is left for the express purpose of being accepted, and is retained by the drawee, such retention is as much an acceptance as if he had written his name upon the face of it. 1 Camp. 425, n. — ED.

² Guildhall Sittings, 1800; Chitty on Bills of Exch. 160.

accepted, to the agent of Harvey; but here there is no usual course of dealing, for this is an insulated transaction between the plaintiff and defendant, and that case, therefore, does not apply. *Trimmer v. Oddy and Bentinck v. Dorrien and Thornton v. Dick*¹ proceed upon a different principle: there the acceptor, having once accepted, was not permitted to cancel or revoke his acceptance, and such cancellation was held to make no difference; but the liability was held to continue as if the acceptance had remained on the face of the bill. Here, however, there was not any acceptance, but on the contrary a refusal to accept. The case of *Clavey v. Dolbin*² is a decisive authority against this verdict, and is almost precisely similar in its circumstances to the present case. Besides, it is clear from the plaintiff's own conduct that he did not consider the defendant liable, at a period long subsequent to the time when the bill was left. For he attended in Egerton's chambers at the end of June for the purpose of getting payment from the drawer. That, however, was not necessary if the defendant was then liable as acceptor. Then the destruction of the bill cannot amount to an acceptance. It may, perhaps, be the ground of an action against the defendant, but he cannot in consequence of that act be charged as acceptor; for in that character he can only be liable by the custom of merchants, and by that custom the destruction of a bill does not amount to an acceptance.

LORD ELLENBOROUGH, C. J. I do not recollect that any question was made at the trial as to the correctness of Gould's evidence. His statement was, that the bill in this case was originally left with the defendant for acceptance, and by the defendant's own letter it afterwards appeared that the bill had been destroyed by him. I certainly at that time proceeded on the ground that it was the ordinary and recognized custom of merchants that when a bill has been left for acceptance, if after a reasonable time has expired (and here a reasonable time had expired) the party omitted to return the bill, he must be considered as having retained it for acceptance. This case goes still further; for here the defendant by his own act puts it wholly out of his power ever to return it, and thereby deprived the holder (there being no power of re-creating the bill) of the advantage of being able to prove the handwriting of the drawer. In such a case, I have always considered it as a matter of course that such retention and destruction of a bill of exchange was tantamount to an absolute refusal to redeliver it, and was therefore, in point of law, an acceptance. But it is contended that no case can be cited which goes so far as this proposition. The principle laid down by Lord Kenyon, in

¹ 4 Esp. 270.² Ca. temp. Hardw. 278.

Trimmer v. Oddy, seems to me to govern this case. That decision, I well remember, made a considerable impression on my mind. In the ordinary course of business, when a bill is left with the acceptor, he is to consider whether he will accept it or return it. If he, without saying any thing, retains it in his hands, the law then presumes that he has done that for which the bill was left, and which is for the benefit of the party leaving the bill; viz., that he has accepted it. Here, however, it is said that Ward absolutely refused to accept, and it is contended that that circumstance makes the difference. But the period when he did this does not distinctly appear. It might be after a reasonable time had elapsed. Suppose the bill delivered to him on the 29th May; the meeting of Egerton and Jeune was not till the end of June, and the bill was not destroyed till the 9th of July. Then a reasonable time might have elapsed before the refusal took place, and a reasonable time did at all events elapse before the destruction. If so, the bill was in point of law then accepted by Ward, and the acceptance could not afterwards be retracted. If indeed the bill had not originally been left for acceptance, the whole case certainly would fall to the ground. But I think it clearly appears from the evidence that it was so left, and the defendant not having in a reasonable time notified his refusal to accept, and having ultimately destroyed the bill, must, as it seems to me, be held liable for it as the acceptor. I think, therefore, that this rule must be discharged.

BAYLEY, J. I am not prepared to say that the defendant can, in the present case, be considered as the acceptor of this bill. The bill, as it appears from the evidence, was drawn on the 28th May, by Godfrey, on the defendant, and was payable at sight. And on the 29th May the plaintiff, having gone down from London to the defendant's house in the country for that purpose, made an application to him either for payment or acceptance of the bill; but it is not clear for which of these two the application was made. No payment is then made, nor is there any reason to suppose that any acceptance was then given. For some reason, however, which does not appear, the bill was then left in the possession of the defendant, where it remained till the 9th July, the time when it was ultimately destroyed. Where a bill is, in the usual course of business, left for acceptance, it is the duty of the party who leaves it to call again for it, and to inquire whether it has been accepted or not. It is not, as it seems to me, the duty of the other person to send it to him, unless, as in the case cited, of *Harvey v. Martin*, there is a usual course of dealing between the particular individuals concerned so to do. Here the party who left the bill does not appear ever to have called or sent for it; and that materially affects the present case. I forbear to say, at present, what

would be my judgment on the effect of a destruction of the instrument by the party with whom it was left for acceptance, within the reasonable time during which the other party might expect an acceptance of the bill. If a party says he has destroyed the bill, and that he will not accept it, such destruction might probably subject him to an action of trover for the bill; but I cannot think that it would amount to an acceptance of it. For what is an acceptance? It is an engagement of the one party acceding to the proposition of the other; and it would be very strange indeed if a refusal on his part could in law be deemed an acceding to the proposition. But I give no judgment on this point; for the facts here do not warrant the conclusion that the bill was destroyed by the defendant during the period when the plaintiff could consider it as remaining for acceptance. It appears that at the end of June the plaintiff called on Egerton, and introduced himself to him by producing a letter from the defendant. All the circumstances which then came out show plainly that this whole transaction was an insulated one between the parties, and that there was no course of dealing between them; for the drawer Godfrey was entitled to a legacy, and on that ground alone it was that he drew on Ward, the executor. The plaintiff then tells Egerton that the defendant had refused to accept the bill. He does not complain that the bill had been kept by him for an unreasonable time, but applies to Egerton for his assistance in obtaining the money. Egerton tells the plaintiff that Ward has done right in so refusing, and informs him that on the 5th July Godfrey will receive his legacy. On that day all the parties attend, but the money due on the bill does not appear to have been paid. Then after all this, on the 9th July, the defendant writes to the plaintiff that he has destroyed the bill. Now if that were a wrongful destruction by him, trover would lie against him, and he would in that form of action be subject to pay, not the whole bill as the acceptor of it, but only such damages as the party really sustained by this destruction. For if the drawer were a solvent person he would still be liable, and might pay the bill, either in the whole or in part. If, on the other hand, the destruction was excusable from the circumstances of the case, as if it appeared that the plaintiff had treated the bill as of no importance, and had shown his intention of relying, not on the bill, but on the original consideration, then that would perhaps afford to the defendant an answer even to the action of trover. But at all events, either in the one case or the other, the destruction cannot, as it seems to me, amount to an acceptance of the bill by the defendant. I think, therefore, that this rule should be made absolute.

ABBOTT, J. I am not able to satisfy my mind that, under the cir-

cumstances of this case, the defendant is liable as acceptor. There is no case similar in its facts to this; for this transaction is out of the course of the ordinary dealing between merchants. It appears that the defendant was one of two executors to a will, under which Godfrey was entitled to a legacy of £200, on the credit of which he drew the bill in question. The plaintiff does not send the bill by the post, or to any agent in the country, but goes himself with it, and returns without it; then, at the end of the month of June, he introduces himself by a letter to Egerton, and desires his assistance to secure the payment of the money. The bill, too, which was drawn on the 28th May, must have been placed by the plaintiff in the defendant's hands in the beginning of June, and the whole transaction ought to have been completed early in that month. We then find that the plaintiff, even at the end of that month, does not rely on the detention of the bill having amounted in law to an acceptance, but requests Egerton to help him to get the money from Godfrey, which could not have been necessary if Ward had then been liable. Now the account of the witnesses, both on one side and on the other, is this: Gould says that Ward admitted that the bill was left with him for acceptance; and Egerton states that the plaintiff told him that Ward had refused to accept the bill. And in fact the plaintiff does not then seem to have considered the defendant liable to him; and I cannot infer that the defendant, by retaining the bill, had then made himself liable as acceptor. And if he was not then liable, I do not think the subsequent destruction of the bill would make him so. I look with the greatest anxiety at these cases of constructive acceptance; for every decision of that kind introduces uncertainty upon a subject where the public interest requires that the greatest certainty should prevail. If indeed it were *res integra*, it would be most desirable that the liability of the acceptor should be confined to the case of an actual acceptance on the face of the bill. I own that I wish the rule had been so laid down originally.

HOLROYD, J. It seems to me that there is considerable doubt upon the present question. I have always understood that where a bill is left for acceptance, and is not returned when called for, and any act of ownership has been exercised with respect to the bill by the party with whom it was left for acceptance, that it amounted to an acceptance. But I cannot say that the mere non-return of the bill, unaccompanied with any act of disposing of it, is so. In this case, where there was a previous refusal, and where the plaintiff himself, at the end of June, seems not to have considered the defendant liable, I do not think that the subsequent destruction of the bill would make him answerable as acceptor. But, at all events, I think there should be a

new trial in this case, in order that these facts may, if necessary, be put upon the record, and the case be further considered in a court of error.

*Rule absolute.*¹

DUFAR, EXECUTOR, &C., OF DUFAR, v. OXENDEN.

AT NISI PRIUS, CORAM PATTESON, J., MAY 27, 1831.

[*Reported in 1 Moody & Robinson, 90.*]

ASSUMPSIT by the executor of the payee of a bill against the acceptor.

The bill was drawn by Dufar, payable to his own order, and addressed to the defendant, who wrote across it, "Accepted: payable at Messrs. Stevens & Co.," without any signature.

F. Pollock, for the defendant, objected that this was no acceptance for want of a signature.

Gurney, for the plaintiff, referred to an anonymous case in Comb. 401, as showing that the acceptance was sufficient, and said that the same doctrine was adopted in Bayley on Bills, 141 (4th ed.).²

F. Pollock. At that time, a parol acceptance was sufficient; and it was held that any circumstances from which it might be inferred that the drawer intended to pay the bill amounted to an acceptance. But the law is altered by the Stat. 1 & 2 Geo. IV. c. 78, § 2, which requires the acceptance to be in writing on the face of the bill; and there arises, therefore, a question of law, whether this unsigned writing can now amount to an acceptance. That question, if it becomes material, may be reserved for the opinion of the court; but there is also a question of fact, whether, even if such an acceptance may by law be good, this must not be considered as merely an unfinished instrument, put

¹ *Clavey v. Dolbin*, C. T. Hard. 278; *Mason v. Barff*, 2 B. & Al. 26; *Overman v. Hoboken Bank*, 30 N. J. 61; 31 N. J. 563, *accord*.

See *Hall v. Steel*, 68 Ill. 231; *Hough v. Loring*, 24 Pick. 254; *Dunavan v. Flynn*, 118 Mass. 537; *Koch v. Howell*, 6 W. & S. 350.

By statute in New York, "Every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted, to the holder, shall be deemed to have accepted the same." 2 Rev. St. (6th ed.) 1161. This provision has been adopted in some other States. G. & C. Ark. Stat. § 554; 2 Civ. Code Cal. § 3195; Gen. Stat. Kans. c. 14, § 13; 1 Wagn. Mo. Stat. c. 18, § 6. — ED.

² See also *Chitty on Bills*, 173, 174 (6th ed.).

into a condition to be completed by mere signature whenever the party pleased, but not meant to operate till then.

PATTESON, J., in summing up to the jury, said that he was of opinion that the writing might be valid in law as an acceptance, notwithstanding the want of signature, but that it was a question for the jury whether it was intended to operate as an acceptance in its present state. It is very improbable that it was not so intended; for why did the defendant part with the possession of it, if it were to be treated as incomplete, and brought back to him for signature before it was to have any validity? That, however, is a question for the jury; and they will find for the plaintiff or the defendant on the counts on the bill of exchange according to their opinion of it. The plaintiff is, at all events, entitled, on other evidence in the cause, to a verdict for the greater part of the sum, on the common counts.

Verdict for the plaintiff on the bill.

LESLIE v. HASTINGS.

AT NISI PRIUS, CORAM LORD LYNDHURST, C. B., JUNE 17, 1831.

[*Reported in 1 Moody & Robinson, 119.*]

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange.

For the defendant the drawer was called, who proved that the defendant had given him a stamp with his acceptance in blank, authorizing him at the time to draw for a certain sum at a specified date. The bill declared on was drawn by him upon this stamp, in conformity with such authority.

Jervis, for the defendant, argued that since the stat. 1 & 2 Geo. IV. c. 78, § 2, which makes it essential to the effect of an acceptance of an inland bill of exchange that it should be "in writing on such bill," an acceptance in blank was altogether a nullity; that it could have no more effect than a parol promise to accept a bill before it is in existence, as to which he referred to the language of Lord Kenyon in *Johnson v. Collings*, and he cited, in confirmation of his argument, the observations of Mr. Selwyn, in the last edition of his *Law of Nisi Prius*, p. 326.

LORD LYNDHURST, C. B. I can entertain no doubt on the point. The provision of the 1 & 2 Geo. IV. which has been relied on, was introduced merely to get rid of questions as to promises to accept. Here is an actual acceptance in writing, with an express authority to fill up the bill in a particular mode, and that authority has been pursued. I must advise the jury to find for the plaintiff.

*Verdict for the plaintiff.*¹

¹ *Molloy v. Delves*, 7 Bing. 428; *Baker v. Jubber*, 1 M. & G. 212 (*semble*); *Downes v. Richardson*, 5 B. & Al. 675; *Cameron v. Morrison*, Court of Session, Jan. 20, 1869, *accord.* — ED.

SPEAR & PATTEN v. PRATT.

IN THE SUPREME COURT, NEW YORK, MAY, 1842.

[Reported in 2 Hill, 582.]

ASSUMPSIT, tried at the Onondaga Circuit, in September, 1841, before Moseley, C. J. The action was against the defendant, Frederick Pratt, as acceptor of a bill of exchange, payable to the order of the plaintiffs. The defendant's name was written across the face of the bill; and the question was, whether this was such an acceptance as is required by the statute. It was admitted that the defendant, at the time of the acceptance, was a resident of this State. His counsel insisted at the trial that the acceptance was insufficient to charge him; but the circuit judge, being of a different opinion, directed the jury to find for the plaintiffs, which they accordingly did; and the defendant's counsel, having accepted, now moved for a new trial upon a bill of exceptions.

A. *Taber*, for the defendant.

B. *D. Noxon*, for the plaintiffs.

By the Court, COWEN, J. Any words written by the drawee on a bill, not putting a direct negative upon its request, as "accepted," "presented," "seen," the day of the month, or a direction to a third person to pay it, is *prima facie* a complete acceptance by the law-merchant. Bayley on Bills, 163 (Am. ed. of 1836), and the cases there cited. Writing his name across the bill, as in this case, is a still clearer indication of intent, and a very common mode of acceptance. This is treated by the law-merchant as a written acceptance, a signing by the drawee. "It may be," says Chitty, "merely by writing the name at the bottom or across the bill;" and he mentions this as among the more usual modes of acceptance. Chitty on Bills, 320 (Am. ed. of 1839).

It is supposed that the rule has been altered by 1 R. S. 757 (2d ed.), § 6. This requires the acceptance to be in writing, and signed by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law-merchant to be both a writing and signing. The statute contains no declaration that it should be considered less. An indorsement must be in writing, and signed; yet the name alone is constantly holden to satisfy the requisition. No particular form of expression is necessary in any contract. The customary import of a word, by reason of its appearing in a particular place, and standing in a certain relation, is considered a written expression of intent quite as full and effectual as if pains had been taken to throw it into the most

labored periphrase. It is said the revisers, in their note, refer to the French law as the basis of the legislation which they recommended; and that the French law requires more than the drawee's name, — the word "accepted," at least. That may be so; but it is enough for us to see that both the terms and the spirit of the act may be satisfied short of that word, and more in accordance with the settled forms of commercial instruments in analogous cases. The whole purpose was probably to obviate the inconveniences of the old law, which gave effect to a parol acceptance.

*New trial denied.*¹

¹ Kaufman v. Barringer, 20 La. An. 419; Peterson v. Hubbard, 28 Mich. 197; Wheeler v. Webster, 1 E. D. Sm. 1, *accord*.

Hindhaugh v. Blakey, 3 C. P. D. 136, *contra*. In the latter case, Denman, J., who delivered the opinion of the court, said: "Before the statute of 1 & 2 Geo. IV. c. 78, § 2, it was not necessary that a bill should be accepted by any writing upon the bill itself; it was sufficient if in any other document the acceptor used language showing his intention to be bound by the bill as acceptor. Wynne v. Raikes. It was also sufficient before that statute if the drawee verbally undertook to pay an existing bill. Lumley v. Palmer, Powell v. Monnier. Disapprobation of the law as it then existed was expressed by very learned judges. See per Lord Kenyon in Johnson v. Collins, and per Lord Ellenborough in Clark v. Cock, 4 East, 72; and it was one of the particulars in which the English law was at variance with the law of Scotland.

"In the year 1821, it was enacted by 1 & 2 Geo. IV. c. 78, § 2, 'that no acceptance shall be sufficient to charge any person unless such acceptance be in writing on such bill.'

"Since this statute, it has been laid down by high authority that a mere signature on the face of the bill, without any words of acceptance, may be an acceptance in writing within the statute. Selw. N. P. (11th ed.), 348; Byles, Bills (12th ed.), 191; and, on the other hand, that words of acceptance without a signature, if intended as an acceptance, might suffice. Dufaur v. Oxenden. See also Corlett v. Conway, 5 M. & W. 655, per Parke, B.

"By 19 & 20 Vict. c. 97, § 6, it was enacted 'that no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor or some person duly authorized by him.'

"In the present case it was contended that, inasmuch as before the statute a mere signature would have been a sufficient acceptance in writing within 1 & 2 Geo. IV. c. 78, § 2, it was not the less so now; and that, inasmuch as it was a signature of the acceptor, the bill was both accepted in writing, and signed by the acceptor, within the meaning of the later enactment. But, looking at the history of the law and of the enactments on the subject, we are of opinion that the county-court judge was right in holding that the statute had not been complied with.

"Comparing the words of the later statute with those of the former, we think it impossible that a mere signature of a name can be held to fulfil the double requirement that the acceptance shall be in writing on the bill, and signed by the acceptor. We therefore think that, upon the question submitted to us, the learned county-court judge was right."

The effect of Hindhaugh v. Blakey was immediately nullified by act of Parliament. *Infra*, p. 186. — ED.

SECTION II.

An Acceptance must be in Writing on the Face of the Bill.

1704.

[3 & 4 Anne, c. 9, §§ 4, 5, and 8.]

AND whereas by an Act of Parliament made in the ninth year of the reign of his late Majesty, King William the Third, entitled an act for the better payment of inland bills of exchange, it is, among other things, enacted that, from and after presentation and acceptance of the said bill or bills of exchange (which acceptance shall be by the underwriting the same under the party's hand so accepting), and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the same bill or bills to be protested in manner as in the said act is enacted; and whereas, by there being no provision made therein for protesting such bill or bills, in case the party on whom the same are or shall be drawn, refuse to accept the same, by underwriting the same under his hand, all merchants and others do refuse to underwrite such bill or bills, or make any other than a promissory acceptance, by which means the effect and good intent of the said act in that behalf is wholly evaded, and no bill or bills can be protested before or for want of such acceptance by underwriting the same as aforesaid, for remedy whereof be it enacted by the authority aforesaid: That from and after the first day of May, which shall be in the year of our Lord one thousand seven hundred and five, in case, upon presenting of any such bill or bills of exchange, the party or parties, on whom the same shall be drawn, shall refuse to accept the same, by underwriting the same, as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign bills of exchange; any thing in the said act, or any other law to the contrary notwithstanding, for which protest there shall be paid two shillings, and no more.

Provided always, that from and after the said first day of May no acceptance of any such inland bill of exchange shall be sufficient to charge any person whatsoever, unless the same be underwritten or indorsed in writing thereupon; and if such bill be not accepted by such underwriting, or indorsement in writing, no drawer of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for non-acceptance thereof, and within fourteen days after such protest the same be sent, or otherwise notice thereof be given to the party from whom such bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due and payable, then no drawer of such bill shall be compellable to pay any costs, damages, or interest thereupon, unless a protest be made and sent, or notice thereof be given, in manner and form above mentioned; nevertheless, every drawer of such bill shall be liable to make payments of costs, damages, and interest upon such inland bill, if any one protest be made of non-acceptance or non-payment thereof, and notice thereof be sent, given, or left, as aforesaid.

Provided, that nothing herein contained shall extend to discharge any remedy that any person may have against the drawer, acceptor, or indorser of such bill.

LUMLEY v. PALMER.

IN THE KING'S BENCH, EASTER TERM, 1734.

[Reported in 2 Strange, 1000.¹]

THE defendant was sued as acceptor of a bill of exchange. And upon the evidence it appeared to be a parol acceptance only, which the Chief Justice ruled to be sufficient, that being good at common law, and the Statute 3 & 4 Anne, c. 9, which requires it to be in writing in order to charge the drawer with damages and costs, having a proviso that it shall not extend to discharge any remedy that any person may have against the acceptor. Upon this direction, the jury found for the plaintiff. But the Chief Justice of the Common Pleas having lately ruled it otherwise in the case of *Rea v. Meggott*, the court was moved for a new trial. And, in order finally to settle this point, it was ordered to be argued; and after argument the court was of opinion that the direction in the present cause was right, and agreeable to constant practice, and therefore ordered the *postea* to the plaintiff.²

¹ C. t. Hard. 74, s. c. — Ed.

² "The court has not of late been very nice with regard to what shall be construed to be an acceptance. For though formerly it was held necessary that an acceptance should be in writing, yet of late years a parol acceptance has been deemed sufficient. And, indeed, at present almost any thing amounts to an acceptance." *Per* Willes, J., in *Sproat v. Matthews*, 1 T. R. 185. Lord Ellenborough, Mr. Justice Lawrence, and Mr. Justice Le Blanc, in *Clarke v. Cook*, 4 East, 67, 72, 73, and Mr. Justice Holroyd, in *Rees v. Warwick*, 2 B. & Al. 116, expressed their regret that the doctrine of a verbal acceptance should have become established. See also *Espy v. Cincinnati Bank*, 18 Wall. 620; *Pierce v. Kittredge*, 115 Mass. 375. The prevalence of this anomalous doctrine is apparent from the following cases: *Anon.*, 12 Mod. 375; *Clavey v. Dolbin*, C. t. Hard. 278; *Cox v. Coleman*, Bayley, Bills (6 ed.), 176; *Wilkinson v. Lutwidge*, 1 Stra. 648; *Ereskine v. Murray*, 2 Stra. 817; *Julian v. Shobrooke*, 2 Wils. 9; *Sproat v. Matthews*, 1 T. R. 182 (*semble*); *Pierson v. Dunlop*, Cowp. 571; *Miln v. Prest*, 4 Camp. 393; *Mendizabal v. Machado*, 3 M. & Sc. 841; *Canepa v. Larios*, 2 Knapp, 276; *Scudder v. Un. Bank*, 91 U. S. 406; *Mason v. Dousay*, 35 Ill. 424; *Sturges v. Fourth Nat. Bank*, 75 Ill. 595; *Stockwell v. Bramble*, 3 Ind. 428; *Bird v. McElvaine*, 10 Ind. 40; *Miller v. Neihaus*, 51 Ind. 401 (*semble*); *Grant v. Shaw*, 16 Mass. 341; *Hough v. Loring*, 24 Pick. 254; *Ward v. Allen*, 2 Met. 53; *Wells v. Brigham*, 6 Cush. 6; *Pierce v. Kittredge*, 115 Mass. 374; *Williams v. Winans*, 2 Green, 339; *Edson v. Fuller*, 22 N. H. 183; *Barnet v. Smith*, 30 N. H. 256; *Walker v. Lide*, 1 Rich. 249; *Fisher v. Beckwith*, 19 Vt. 31; *Rutland Bank v. Woodruff*, 34 Vt. 92; *Arnold v. Sprague*, 34 Vt. 402. The same cases show also that in the case of existing bills the inquiry whether the plaintiff took the bill in reliance upon a verbal promise to accept the same is irrelevant, for in all of them the promise to accept was made to the respective plaintiffs, after they became the holders of the bills declared upon. See, however, *Overman v. Hoboken Bank*, 30 N. J. 61, where it was held that a verbal promise to accept an existing bill would enure as an acceptance only in favor of one who took the bill on the faith of the promise. — Ed.

POWELL, SENIOR AND JUNIOR, v. ELIZABETH MONNIER,
WIDOW AND EXECUTRIX OF JOHN MONNIER.

IN CHANCERY, BEFORE LORD HARDWICKE, C., MAY, 1737.

[*Reported in 1 Atkyns, 611.*]

THE plaintiffs, who were partners, the 3d of April, 1731, received a bill of exchange from Charles Newburgh, then dated and drawn on John Monnier for £50 to the plaintiffs or order, thirty days after date, indorsed by the plaintiffs, and negotiated by several persons; on the 15th of April, it came into the custody of Lavington and Paul of Exeter, merchants, who sent up to Monnier the bill of exchange; he received it, and kept it ten days before the same became due, without making any objection, and, whilst he had it in his hands, wrote on the left side of the top thereof, No. 84, and at the bottom the sixth of May, which the plaintiffs charged were the private mark or number of bills by him accepted, and intended to be paid, and upon the sixth of May, the time when payable, Monnier, on that day, sent it back to Lavington and Paul, and refused to accept it, or allow it as so much received by him on their account; whereupon Lavington and Paul demanded and received the £50 of the plaintiffs, who can have no satisfaction against Newburgh, he having become a bankrupt and insolvent, before the return of the bill.

The bill is therefore brought for £50 with interest due thereon; Monnier died after putting in his answer, and the cause has been revived against his executrix.

It was admitted that Newburgh acquainted Monnier by letter of his having drawn the £50 bill, and desiring him to accept and pay the same; to which Monnier, on the 13th of April, wrote a letter in answer, that the £50 bill should be duly honored, and placed to his debt.

It was insisted for the plaintiffs that if Monnier had not intended to accept and pay the bill, he should, according to the custom of merchants, have returned the same immediately to Lavington and Paul, whereby the plaintiffs might have got the £50 from Newburgh, who was then, and several days after, in good credit, and particularly in such credit with the defendant that, after the plaintiffs' bill came to his hands, Newburgh drew another bill of exchange on him for £18, three days after date, which was duly paid.

Mr. Fazakerly, who was counsel for the defendant, insisted that the suit here ought not to be proceeded upon any further, but should go off to a trial at law, as it is a mere legal question.

LORD CHANCELLOR. If Monnier had been living, I should have been of opinion that the bill ought to have been dismissed; but now he is dead, and the suit is revived against his executrix, notwithstanding it is a legal question, the plaintiffs may bring their bill, and by praying satisfaction out of assets, and a discovery of assets, it is made a case of which this court takes cognizance, and if they retain bills, where it is a legal demand, they must judge upon the facts relating to the legal demand, and, unless those facts are doubtful, will not dismiss the bill, and turn it over to a trial at law.

Mr. Fazakerly then, upon the merits, alleged that John Monnier kept the £50 bill till the 6th of May, merely in expectation of receiving money or effects from Newburgh to answer it, and that, in receiving it from indorsees, he entered it in his bill book, as he constantly did all bills he received, whether good or bad, and that it was then entered at or against No. 84, and therefore wrote that figure on the top of it, and that it did not denote the number of bills accepted or entered to be paid by him, and that writing the 6th of May denoted the day the defendant returned the bill, that Newburgh not remitting any effects to answer it, he returned it to Lavington and Paul; that, at the time of drawing the bill, Monnier had not, nor hath since had, any effects of Newburgh's in his hands; that when Monnier returned the bill to Lavington and Paul, he wrote to them as follows: "You remitted me Newburgh's bill, which I do not pay for reasons, therefore please to credit me and note £50, the same being due to-day, and let the indorsees reimburse you." And therefore, upon all other circumstances, this is not such an acceptance as will make Monnier liable to pay it.

LORD CHANCELLOR. The principal question is, whether this is a sufficient acceptance to charge the defendant, and if there was any doubt of it as to the fact, or whether, in law, what has been done amounts to an acceptance, it might still be necessary to send the parties to a trial at law, but I think there is no doubt of either.

Monnier, when the bill was sent to him, received it, entered it in his book, as his course of trade is proved to have been, under a particular number, and wrote that number under the bill; now it has been said to be the custom of merchants, that if a man underwrites any thing, let it be what it will, that it amounts to an acceptance; but, if there was no more than this in the case, I should think it of little avail to charge the defendant, because that matter has been fully explained. But what determines me are Monnier's letters, by which it appears very clearly that he has accepted of it. In one he particularly mentions the £50 bill, and says it shall be duly honored, and placed to the drawer's debt; nor is there in his letters to Newburgh, or the indorsees, one expression that shows the least suspicion of Newburgh's credit.

I think there can be no doubt but an acceptance may be by letter, and has been so determined ; there have been questions, too, whether a parol acceptance could be good. Lord Chief Justice Eyre held it might. Lord Raymond held the contrary ; and there was a like point before me at *nisi prius*, in the cause of Lumley and Palmer, and I had a case made of it for the opinion of the Court of King's Bench, where it was several times argued, and at last solemnly determined that such acceptance is good. Much more then must an acceptance by letter be good.

As to the plaintiff's being entitled to interest, I was at first doubtful whether he could demand any ; but on reading the Statute of 3 & 4 Anne, c. 9, § 4, I think it a clear case that he is, though no protest for that is made necessary by the act, it being requisite only to entitle a payee to damages against a drawer, but does not mention the acceptor of a bill of exchange ; and all the damage, therefor, that can be had in such a case is the interest.

LORD CHANCELLOR decreed the defendant to pay to the plaintiffs the sum of £50, together with interest for the same from the time of filing the original bill, at the rate of £4 per cent, and further ordered that she should also pay to the plaintiffs their costs of this suit, from the time of filing of the bill of revivor, to be taxed.¹

JOHNSON AND ANOTHER *v.* COLLINGS.

IN THE KING'S BENCH, NOV. 25, 1800.

[*Reported in 1 East, 98.*]

THE plaintiffs declared in the first count against the defendant as the acceptor of a bill of exchange drawn by one Ruff, dated the 25th of October, 1799, and directed to the defendant, whereby he was required two months after date to pay to the order of the drawer £23 10s. 6d. value received, which bill was afterwards indorsed by Ruff to one Jane Ruff, and by her to the plaintiffs. There were other general counts for money had and received, money paid, and upon an account stated. To which there was a plea of the general issue.

At the trial before Le Blanc, J., at the last Worcester assizes, it appeared in evidence that Ruff, having furnished goods to the defendant to the amount of the bill, applied to him for payment, when the defendant excused himself at that time, but said that if Ruff would

¹ Reg. Lib. B. 1736, fol. 332.

draw on him a bill at two months from the 25th of October for the amount, he should then have money, and would pay it. Ruff afterwards drew the bill in question, dated 25th of October at two months, but it never was in fact presented to the defendant for his acceptance; nor did he ever in fact accept it, otherwise than as is stated above. It was said at the trial to be the practice at Bristol, where the defendant lived, not to accept bills or to have them presented for acceptance. Ruff, to whose own order it was made payable, having indorsed the bill, afterwards passed it to the plaintiffs in discharge of an old debt; but no communication took place at the time between the plaintiffs and the defendant. After this and before the bill became due, Ruff became a bankrupt; and when the bill was due, the plaintiffs presented it to the defendant for payment, who then declined it on account of Ruff's bankruptcy without an indemnity, admitting, however, that he owed the money either to Ruff or Ruff's assignees. The learned judge was of opinion that a mere promise, such as this, to accept a bill when it should be drawn, at least unless made to a third person, or accompanied at least with circumstances which might induce a third person to take the bill (which was not the case here), did not amount to an acceptance, and therefore the plaintiffs were not entitled to recover on the first count. And that as there had been no communication between these parties at the time, nor any consideration having passed as between them, there was no evidence to warrant a finding for the plaintiffs on either of the money counts; whereupon he directed a nonsuit to be entered, with liberty to the plaintiffs to move to set it aside and enter a verdict for the amount of their demand, if the court should be of opinion that they were entitled to recover on either of the counts. A rule *nisi* was accordingly obtained for this purpose on a former day.

Williams, Serjt., who was now to have shown cause, was stopped by the court.

Wigley and *Clifford*, in support of the rule. First, a promise to accept a bill when drawn amounts in law to an acceptance. In *Pillans and Rose v. Van Mierop and Hopkins*,¹ the plaintiffs having advanced money to one White upon the faith of a written assurance² by letter

¹ 3 Burr. 1663.

² The learned counsel misstates the case of *Pillans v. Van Mierop*. The plaintiffs in that case advanced nothing upon the faith of any undertaking by the defendants to honor the plaintiffs' bills. On the contrary, it was not until after the plaintiffs had advanced their money to White that the plaintiffs requested the defendants to honor, and the defendants promised to honor such bills as the plaintiffs should draw upon them. The case itself is valueless as an authority, inasmuch as each of the three reasons put forward by the court to establish the defendants' liability — namely,

from the defendants "that they would accept such bills as the plaintiffs should in a month's time draw upon them for £800 upon the credit of White," the court after much deliberation held that, whether it were an actual acceptance or a loan to White upon the credit of the defendants, it would equally bind the latter. But Lord Mansfield there said, "This amounts to the same thing as an acceptance. 'I will give the bill due honor' is in effect accepting it. If a man agree that he will do the formal part, the law looks upon it, in the case of an acceptance of a bill, as if actually done." [WILMOT, J., said: "An agreement to accept a bill to be drawn in future would, as it seems to me, by connection and relation, bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn." YATES, J., said: "This agreement to honor the bill was a virtual acceptance of it." Again: "A promise to accept is the same as an actual acceptance." ASTON, J., said: "The defendants have undertaken to honor the plaintiffs' draft, therefore they are bound to pay it."] The same doctrine was admitted in *Mason v. Hunt*;¹ but that was a conditional acceptance, and the condition was afterwards broken. In *Powell v. Monnier* there was an assurance by letter that the bill should be accepted, which was holden sufficient to bind the drawee; but that was after the bill was drawn.²

LORD KENYON, C. J. This is a question of great moment. It is much to be lamented that any thing has been deemed to be an acceptance of a bill of exchange besides an express acceptance in writing; but I admit that the cases have gone beyond that line, and have determined that there may be a parol acceptance; that perhaps was going too far, but at any rate the determinations have gone no further, and I am not disposed to carry them to the length now contended for, and to say that a promise to accept a bill before it is drawn is equally binding as if made afterwards. It is not generally true that a promise to do a thing is the same thing in law as the actually doing it; it certainly is not so, as applied to this case. This was a promise to accept a non-existing bill, which varies this case from all those which have been decided upon the same subject; and I know not by what law I can say that such a promise is binding as an acceptance. The consequence is that the plaintiffs cannot recover upon the count as upon an acceptance of a bill of exchange.

1, that a promise in writing is binding without a consideration; 2, that there was a consideration in fact in that case; 3, that the promise to accept was the same as an acceptance — has been repudiated. — ED.

¹ Dougl. 227.

² The counsel for the plaintiff then contended, but unsuccessfully, that the evidence would warrant a verdict upon the money counts. His argument and the opinions of the court upon that point have been omitted. — ED.

GROSE, J. It would be of most dangerous consequence to relax the rule of law to the extent here contended for. By the general rule, a chose in action is not assignable, except by the custom of merchants. The assignment of a chose in action by a bill of exchange is founded on that law, and cannot be carried further than that will warrant it; and no authority has been cited to show that by the law-merchant a mere promise to accept a bill to be drawn in future amounts to an actual acceptance of the bill when drawn. Then we have no authority to extend the rules which have been hitherto established.

LE BLANC, J. In the case of *Pierson v. Dunlop*,¹ Lord Mansfield limited, and truly limited, the doctrine which had been before laid down in *Pillans v. Van Mierop*. He there says: "It has been truly said as a general rule that the mere answer of a merchant to the drawer of a bill, saying, 'He will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but, if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." Therefore he explains and limits his own rule which he had before delivered concerning such an acceptance, confining it to the case where credit is given by a third person upon the faith of such an assurance, on which he acts, and by which he is induced to take the bill.

LORD KENYON, C. J., added that he thought that the admitting a promise to accept before the existence of the bill to operate as an actual acceptance of it afterwards, even with the qualification last mentioned, was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond the proper boundary, though this case was not helped even by that opinion.

*Rule discharged.*²

WYNNE AND ANOTHER v. RAIKES AND ANOTHER.

IN THE KING'S BENCH, NOV. 27, 1804.

[*Reported in 5 East, 514.*]

THE first count of the declaration stated that, on the 9th of November, 1801, Aquila Brown drew a bill of exchange on the defendants for £500, payable to the order of Thomas Andrews and Butler, at sixty

¹ Cowp. 573.

² *Pillans v. Van Mierop*, 3 Burr. 1663; *Miln v. Prest*, 4 Camp. 393; *Holt*, 181, s. c. (*semble*), *contra*.

See *Mason v. Hunt*, 1 Doug. 297. — ED.

days' sight; that Thomas Andrews and Butler indorsed the said bill to the plaintiffs; and that the defendants, upon sight thereof, duly accepted the bill. There were also counts for money paid, and for money had and received. The defendants pleaded the general issue; and, at the trial before Lord Ellenborough, C. J., at the sittings after last Hilary term at Guildhall, a verdict was found for the plaintiffs for £555, subject to the opinion of this court on the following case:—

On the 9th of November, 1801, Aquila Brown, who resides at Baltimore in North America, drew the bill of exchange in question at that place upon the defendants, who reside in London, and for a valuable consideration paid the bill to Thomas Andrews and Butler, residing in Baltimore, who afterwards, for a valuable consideration, indorsed it to the plaintiffs, who reside in London. On the 9th of November, 1801, Aquila Brown, by letter of that date, advised the defendants of having valued on them by divers bills, amounting together to £5,548 14s. 2d. sterling, of which the bill in question was one, the amount of which bills Aquila Brown, in that letter, requested the defendants to honor with acceptance, and place the amount to his debit, and which letter of advice was duly received by the defendants. The plaintiffs, on receiving the bill in question in England, presented it, on the 2d of January, 1802, to the defendants for their acceptance; but the defendants refused to accept it. On the 13th of January, 1802, the defendants wrote a letter to Aquila Brown, the drawer, which letter, after mentioning some damage which the cargo of the "Chesapeake," consigned to the defendants, had sustained, and difficulties in which it had been involved; as also an attachment laid upon the property of Aquila Brown in the hands of the defendants, among other things, contains the following passages: "Under these circumstances, while your property in the 'Chesapeake' appeared in so very questionable a state that we could not tell what security to rest upon it, you could not expect that we could interfere for any of your bills refused by Mr. Mangin, or even accept all the bills of yours which came in upon us. Several of them, of course, have been noted for non-acceptance; and Messrs. Finlay, Bannatyne, & Co. have officiously sent you a protest on that for £551 15s. for non-acceptance. We have, however, now the satisfaction to mention to you that Mr. Mangin, having resolved to pay many of your bills on him, Messrs. Mellish & Co. have taken off the attachment in our hands; and, since the receipt of Messrs. Muilman's letter of the 5th instant, our prospect of security on the 'Chesapeake' is so much improved that we shall accept or certainly pay all the bills which have hitherto appeared. The one for £6,500, the 19th of October, has not yet been presented to us; but we will hope that the state of your funds will likewise permit us to take care of that."

The bill in question was one of those which had appeared prior to the writing the above letter of the 13th January, 1802, and which letter was received by Aquila Brown, in America, on the 19th of March, 1802. On the 6th of March, 1802, which was sixty days, and three days of grace, after the bill in question was presented for acceptance, the plaintiffs presented the bill to the defendants for payment; but the defendants refused to pay the same; and the plaintiffs caused it to be protested for non-payment. Aquila Brown, the drawer of the bill, was at the time the same was drawn indebted to the defendants in the sum of £5,000, and hath so continued to the present time. The question for the opinion of the court was, whether the plaintiffs were entitled to recover. If the court should be of that opinion, the present verdict to stand; if otherwise, a nonsuit to be entered.

Littledale, for the plaintiffs, relied on the case of *Clarke v. Cock*¹ as in point, to show not only that an acceptance of a bill may be by parol or collateral writing, but also that the terms of the defendants' letter of the 13th of January, 1802, wherein they state "that the prospect of security in the 'Chesapeake' was so much improved that they shall accept or certainly pay all the bills" which had then appeared, did in law amount to an acceptance. In that case, the acceptance was by letter to the drawer, acknowledging notice of the bill having been drawn, and assuring him that it would meet with due honor from him. The only difference between the two cases is that here the letter of the defendants was not communicated to the plaintiffs before the bill became due. But however material that might have been, if the letter were to be considered merely as a special agreement to accept or pay the bill, it matters nothing, considering it as in itself a legal acceptance of the bill; which is a technical term, binding the acceptor equally into whosever hands the bill shall come, and not merely confined in its operation to the particular person to whom the promise was made, or any other to whom it may have been communicated previous to the bill becoming due. If the promise to accept, so made, were to be considered only as a special agreement, the liability of the acceptor would be continually varying, according as the bill got into this or the other person's hands who had or had not notice of the special agreement, and who had or had not taken the bill upon the credit of it. According to the known practice and law of merchants, it is sufficient to fix the acceptor absolutely, if his promise to pay be made to the drawer, who is the fountain-head of the bill, or to the first indorser by whom it is put into circulation. When the letter had once passed out of the defendants' hands, it had its operation; and they had no further con-

¹ 4 East, 57.

cern with the bill than to pay it when due. In the case of *Powell and Another v. Monnier*, the plaintiffs, indorsees, had received the bill before the letter of *Monnier* to the drawer, promising that the bill should be duly honored, was written, and which was holden to be an acceptance. The plaintiffs, therefore, could not have taken the bill on the credit of the letter. So, in *Pierson v. Dunlop*,¹ there was a prior refusal to accept given to the holder, as in this case; yet a subsequent letter to the drawer, saying that his bill would receive due honor was considered as an acceptance; and some expressions to the contrary, attributed to Lord Mansfield in one part of his judgment, were noticed by Lord Ellenborough in *Clarke v. Cock*,² as clashing with what was said by the same noble judge in *Pillans v. Van Mierop*,³ and with other authorities.

Puller, contra, at first proposed to question whether the letter of the 13th of January did amount to a positive promise to pay the bill even as between the drawer and acceptors; but, finding the opinion of the court decidedly against him on that point, he proceeded to distinguish this from the other cases, by observing that here the defendants had expressly refused to the holders, the plaintiffs, to accept the bill, and they followed up such refusal, after writing the letter of the 13th of January to the drawer, by denying payment. That letter, therefore, can only be taken to be a private engagement to the drawer to pay the bill when it became due, upon the supposition that they should then have funds of his in their hands, but accompanied with a direct refusal to accept the bill, so as to make themselves liable upon it in the hands of a third person. The promise to pay to the drawer never reached him in America till after the bill had become due, and had been refused payment. It could not then have any operation. In order to have effect, it must have relation to an existing bill, according to *Johnson v. Collings*; and it cannot vary the case whether the promise be made before the bill is drawn, or after it is due and has been refused payment, when the operation of it is spent. In *Beawes's Lex Mercatoria*, 454, pl. 16, it is said that, "if the possessor of the bill hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draft. though previous to the knowledge of the drawer's misfortunes he had acquainted him with his intention to honor his bill." As to the case of *Powell v. Monnier*, the defendant, after giving the drawer the promise to accept, kept the bill in his hands ten days previous to the time when it became due, without objection, and then returned it to

¹ Cowp. 571.² 4 East, 70.³ 3 Burr. 1666-9.

the indorsees; and, for several days after he had so received it, the drawer continued solvent; by which laches the acceptor clearly made the bill his own. [LORD ELLENBOROUGH, C. J. It does not appear by the report that that formed any part of the ground of Lord Hardwicke's decision. He went on the ground that the letter was an acceptance.] Here the letter never reached the drawer till after the bill had become due and was refused payment; so that it could not possibly have influenced any person to take the bill. And it is on this ground that a collateral promise to accept was considered by Lord Mansfield in *Mason v. Hunt*¹ as constituting an acceptance. And this was confirmed by Le Blanc, J., in *Johnson v. Collins*. Here, however, the possibility of the promise influencing any third person is negatived by the circumstances of the case.

Littledale, in reply, observed that the payees in America would act upon the letter when received, and therefore it would influence the conduct of third persons.

The court considered the case of *Powell v. Monnier* to be in point to the present; but, as it went somewhat further than the other cases, they wished to see if there were any other report of it varying from that in *Atkyns*. Upon this day

LORD ELLENBOROUGH, C. J., delivered judgment.

This case, in all its material circumstances, resembles that of *Powell v. Monnier*, the authority of which has not been, as far as we have been able to find, ever shaken. The letter of the defendants, stated in the case to have been written on the 13th of January, 1802, to Aquila Brown, the drawer, when the bill in question, amongst others drawn by him upon them, had been refused acceptance, after commenting upon the circumstances which had before made the property of the drawer appear to them, the defendants, to be in a very questionable state, particularly in respect to what the drawer had in the "*Chesapeake*," says, "Our prospect of security in the '*Chesapeake*' is so much improved that we shall accept or certainly pay all the bills which have hitherto appeared." And the first question in this case is whether this promise be an acceptance. If either branch of the alternative contained in this promise would be an effectual acceptance, if standing alone, surely it cannot be less so because the promise is couched in terms of an alternative of which each branch is an acceptance. A promise to accept an existing bill is an acceptance. A promise to pay it is also an acceptance. A promise, therefore, to do the one or the other — *i. e.*, to accept or certainly pay — cannot be less than an acceptance. It amounts, I think, in effect to this:

¹ Dougl. 290.

“Whether we shall send for the bill again, and accept it in form or not, is uncertain; but, at any rate, you may depend upon its being paid.” Supposing it to be an acceptance, the time when it is to be considered as made, namely, whether at the date of the letter, or at the time when it reached the drawer to whom it was written in America (which was on the 19th of March, 1802, after the bill had become due), is immaterial, inasmuch as an acceptance after the time appointed for the payment of a bill is good. *Jackson v. Piggot* and *Mutford v. Walcot*.¹

The second question in this case is whether, inasmuch as a bill was not taken by the holders upon the credit of this promise of the defendants so made to the drawers, nor was the same known to them to have been made at all till after the bill was due, they, the holders, can avail themselves of it as an acceptance. In the case of *Powell v. Monnier*, already mentioned, that which was holden an acceptance enuring to the benefit of the indorsees, the plaintiffs, was an acceptance contained in a letter to the drawer, one Newburgh, promising “that his bill should be duly honored.” The promise, being long subsequent to the time when the plaintiffs in that case became possessed of the bill by indorsement, could of course have formed no part of their original inducement to take it. And the promise was in that case, as well as in this, made to a drawer, who had drawn without having any effects in the acceptor’s hands; and it does not appear in the one case more than in the other that the holders, the plaintiffs, ever knew of the acceptance on which they afterwards relied prior to the time when the bill became due. Without oversetting the authority of the case of *Powell v. Monnier*, we cannot say that the plaintiffs are not in the present case, which so entirely resembles it, entitled to recover. And as in adhering to it we violate no principles of commercial convenience, but confirm a rule of law, which we find established on a subject which least of all others endures uncertainty and change, we cannot do otherwise than hold the plaintiffs in this case entitled to recover.

*Postea to the plaintiffs.*²

¹ 1 *Ld. Raym.* 574, *Salk.* 129, &c.

² *Billing v. Devaux*, 3 *M. & Gr.* 565; *Mahoney v. Ashlin*, 2 *B. & Ad.* 478; *Read v. Marsh*, 5 *B. Mon.* 8, *accord*.

To the same effect are *Ex parte Dyer*, 6 *Ves.* 9; *Rees v. Warwick*, 2 *B. & Al.* 113 (*semble*); *Grant v. Hunt*, 1 *C. B.* 44; *Musgrove v. Hudson*, 2 *Stew.* 464 (*semble*); *Cook v. Miltenberger*, 23 *La. An.* 377; *Webb v. Mears*, 45 *Pa.* 222 (*semble*), where the written promise to accept was made to the plaintiff after he became the holder of the bill, and where, therefore, he could not have taken the bill upon the faith of the defendants’ promise.

Conf. Clarke v. Cock, 4 *East*, 57. — *ED*

1821.

[*Stat. 1 & 2 Geo. IV. c. 78, § 2.*]

AND be it further enacted, That from and after the said first day of August [next ensuing, 1822] no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or if there be more than one part of such bill, on one of the said parts.¹

THE BANK OF IRELAND *v.* ARCHER AND DALY.

IN THE EXCHEQUER, MAY 2, 1843.

[*Reported in 11 Meeson & Welsby, 383.*]

ASSUMPSIT on a foreign bill of exchange. The declaration stated that heretofore, to wit, on the 29th day of September, 1842, in parts beyond the seas, to wit, at Waterford, in the kingdom of Ireland, certain persons using the name, style, and firm of J. & C. Scroder, by their said name, style, and firm, made their bill of exchange in writing, and directed the same to the defendants, and thereby required the defendants to pay to the order of them, the said J. & C. Scroder, the sum of £852 10s. sterling, three months after the date thereof, which period had elapsed before the commencement of the suit; and the defendants then accepted the said bill, and the said J. & C. Scroder then indorsed the same to the plaintiffs; of all which the defendants then had notice, and then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof and of their said acceptance thereof, but the defendants did not pay the same when due. The second count stated that theretofore, to wit, on the day and year last aforesaid, in consideration that the plaintiffs, at the request of the defendants, would discount a certain other bill of exchange before then drawn by certain persons using the name, style, and firm of J. & C. Scroder, by their said name, style, and firm, whereby the said J. & C. Scroder required the defendants to pay to their order, three months after the date thereof, the sum of £852 10s.

¹ "The whole effect intended by the enactment of 1 & 2 Geo. IV. c. 78, § 2, probably was to restore the true meaning of 3 & 4 Anne, c. 9, § 5, (providing that no person should be charged by any acceptance unless written in the bill), which was departed from after it had been held in *Lumley v. Palmer*, 2 Stra. 1000, that that section referred only to the drawer's liability for damages and costs." *Per Parke, B.*, in *Mahoney v. Ashlin*, 2 B. & Ad. 483. — *Ed.*

sterling, and would pay to the said J. & C. Scroder the amount of the said last-mentioned bill of exchange, deducting certain reasonable discount in that behalf, in and by certain other bills of exchange indorsed by the plaintiffs, they the defendants promised the plaintiffs to accept the said bill of exchange in this count first mentioned, upon the same being presented to them for their acceptance thereof. The count then averred that the plaintiffs afterwards, to wit, on the 2d October, 1842, confiding in the said promise of the defendants, discounted the said bill of exchange in this count first mentioned, and then paid to the said J. & C. Scroder, in certain other bills of exchange indorsed by the said plaintiffs, the amount of the said bill in this count first mentioned, after deducting such reasonable discount as aforesaid, being a large amount, to wit, the sum of £847 2s.; and although the said J. & C. Scroder, to wit, then indorsed the said bill of exchange in this count first mentioned to the plaintiffs, and the plaintiffs afterwards, and within a reasonable time in that behalf, to wit, on the 10th day of October in the year aforesaid, presented the said last-mentioned bill of exchange to the defendants for their acceptance thereof, and then requested the defendants to accept the same, according to their said promise in that behalf, yet the defendants did not nor would, when the said last-mentioned bill of exchange was so presented to them for their acceptance as aforesaid, and when they were so as aforesaid requested to accept the same, or at any other time, accept the said last-mentioned bill of exchange, but then and always thereafter wholly neglected and refused so to do, and thereby the plaintiffs have wholly lost the said sum of money so advanced by them as aforesaid, and the said bill of exchange is still wholly unpaid to the plaintiffs.

The declaration contained also counts for money had and received, money paid, and on an account stated.

The defendants pleaded to the first count, that they did not accept the said bill of exchange therein mentioned; to the second count, first, that they did not promise to accept the said bill; secondly, a traverse of the consideration alleged; and, thirdly, that the plaintiffs did not discount the said bill of exchange; and to the residue of the declaration, *non assumpserunt*. Issues thereon.

At the trial, before Coltman, J., at the last assizes at Liverpool, it appeared that the action was brought by the plaintiffs to recover from the defendants, who are corn-merchants and commission agents at Liverpool, the amount of the bill mentioned in the declaration, under the following circumstances. On the 8th of July, 1842, Messrs. J. & C. Scroder, who were corn-merchants at Waterford, and correspondents of the defendants, drew a bill of exchange for £850, at three months' date, on the defendants, and discounted it, before acceptance,

at the Branch Bank of Ireland at Waterford. The defendants had then in their possession at Liverpool, for sale on commission, a quantity of Indian corn belonging to Messrs. Scroder; and, on the bill being presented to them at Liverpool, it was duly accepted. In the following September, the defendant Daly, being at Waterford, had an interview with one of the Messrs. Scroder, who told him they should find some difficulty in providing for the bill on its falling due (which would be on the 11th of October), but that, if the defendants would renew their acceptance, he thought he could get it discounted. Daly declined to do so without a deposit in cash, on the ground of the bad state of the markets, and the loss they were likely to sustain by the Indian corn. To this Scroder agreed, and thereupon Daly, being requested to accept another bill for £852 10s., said: "Send it for acceptance as usual, remitting proceeds at the same time, and I will advise my partner in Liverpool of the amount." Accordingly, on the 29th of September, Messrs. Scroder drew on the defendants the bill in question, for £852 10s., and got it discounted, before acceptance, at the same bank. The manager of the bank stated that he was induced to discount the bill upon the representation of Messrs. Scroder that they had arranged with the defendants for the acceptance of it. On the same 29th of September, the following letter was written and sent by Messrs. Scroder to the defendants:—

"GENTLEMEN,— Agreeably to our arrangement with Mr. Daly, please take the enclosed Bank of Ireland indorsements, £847 0s. 2*d.*, being as near as we could go to the amount of your bill, £850, due 11th of next month. We have drawn on you at three months from to-day, £852 10s., favor of the Bank of Ireland, which please protect, hoping that before its maturity you may be able to sell our stuff at a fair price.

J. & C. SCRODER."

In answer to which the following letter was received by the Messrs. Scroder, on the 1st of October:—

"GENTLEMEN,— Your favor, enclosing bills amounting to £847 0s. 2*d.*, is received and passed to your credit. Your draft on us for £852 10s. shall be duly honored. We have no inquiry at present for Indian corn.

P. Pro. Archer, Daly, & Co.,

"P. J. FOREST."

Forest, however, had no authority to accept, and never had accepted, bills of exchange on behalf of the defendants; and they refused to accept the bill when presented to them, Messrs. Scroder having in the mean time stopped payment.

Upon these facts, it was objected for the defendants, and the learned judge was of opinion, that inasmuch as there was no bill in

existence when the promise to accept it was made by the defendant Daly, that promise did not amount to an acceptance, or render the defendants liable, although the plaintiffs had discounted the bill on the faith of their acceptance; and a verdict was accordingly taken for the defendants on the first issue, leave being reserved to the plaintiffs to move to enter a verdict for them for £852 10s. if the court should be of a contrary opinion.

On the 25th April,

Knowles moved accordingly. The question which arises in this case is, whether a parol promise to accept a bill of exchange afterwards drawn, on the faith of which promise the bill is discounted, amounts in law to an acceptance. The case of *Pillans v. Van Mierop*¹ is in effect a decision that it does. The opinion expressed by Lord Kenyon in *Johnson v. Collings* is undoubtedly to the contrary, but in that case it did not in fact appear that any third person was induced by the promise to discount the bill. In *Miln v. Prest*,² Gibbs, C. J., laid it down that a conditional acceptance is as effectual as an absolute one, if the condition be complied with. This, however, was an absolute promise, and could not be repudiated, any more than in *Pillans v. Van Mierop*. The rule of law in America appears to be more comprehensive than would seem to result from the case of *Johnson v. Collings*. Mr. Justice Story says,³ after remarking on the English cases: "The rule, as formerly held, always included the qualification, that the paper containing the promise should describe the bill to be drawn in terms not to be mistaken, so as to identify and distinguish it from all others; that the bill should be drawn within a reasonable time after the paper was written; and that it should be received, by the person taking it, upon the faith of the promised acceptance.

. . . . Under these qualifications, the rule seems to be firmly established in America upon the footing of the old authorities." All the requisites represented here as being necessary to constitute an acceptance appear to concur in this case. [PARKE, B. I thought this point had been settled by *Johnson v. Collings*. Your proposition would lead to an extraordinary state of things; namely, that if the indorsee paid the bill away with notice of the promise to accept, the indorsee might recover against the acceptor, but if not, not; and so there might be several indorsees with different remedies. We will take a short time to look into Mr. Justice Story's work; as far as the English authorities are concerned, I have always understood the point was conclusively settled by *Johnson v. Collings*. It is a question of the law-merchant, and must depend on the authorities.] *Cur. adv. vult.*

¹ 3 Burr. 1663.

² Holt, N. P. C. 181; 4 Campb. 393.

³ Story on Bills of Exchange, § 249, p. 274.

The judgment of the Court was now delivered by

PARKE, B. The point reserved by my Brother Coltman in this case was, whether a parol promise to accept a foreign bill of exchange before it was drawn amounted to an acceptance, such promise having been communicated to the indorsees, the plaintiffs, and the bill having been taken by them on the faith of it. The learned judge thought not; and we agree in this opinion, and think there should be no rule.

The case of *Pillans v. Van Mierop* appears to be the authority on which the doctrine, that a person can be bound by a promise to accept a future bill, is rested. It is not quite clear from the report of that case on what ground the defendant was held liable to the plaintiffs, the drawers; whether on his special contract with them to accept, or as actual acceptor. Some of the judges rest his liability on the ground of special contract, considering that the doctrine of *nudum pactum* does not apply to written or to mercantile contracts; a doctrine which is now entirely exploded. Mr. Justice Yates, as well as Lord Mansfield, expresses an opinion that he was liable, on the authority of the cases which laid it down that an acceptance need not be on the bill itself; not advertng to the distinction between existing and non-existing bills. In *Beawes's Lex Mercatoria*, p. 466, pl. 112, a promise to accept is apparently put on the ground of a contract, for a breach of which an action lies, and not as being an actual acceptance. In *Pierson v. Dunlop*,¹ the supposed rule, that a promise to honor was equivalent to an acceptance, was qualified by Lord Mansfield; and he said that it was not, unless accompanied with circumstances which might induce a third person to take the bill by indorsement; if there were such circumstances, it might amount to an acceptance, though the answer were contained in a letter to the drawer. His Lordship was then speaking of a promise to honor an existing bill; a doctrine which is not now disputed, the case of *Wynne v. Raikes* having established that a promise to the drawer, after a bill is drawn, operates as an acceptance in favor of an indorsee, such promise having not only not been communicated to him, but made, long after the indorsement. In this state of the authorities, it was not surprising that the case of *Johnson v. Collings* decided that a promise to accept a non-existing bill was no acceptance. Mr. Justice Le Blanc alludes to the qualification by Lord Mansfield of the previous doctrine, and supposes it to be meant to apply to non-existing bills only, which is inaccurate; and Lord Kenyon expresses what may be termed a strong opinion, that such a promise would not amount to an acceptance, even with the qualification that the bill is taken on the faith of it.

¹ Cowp. 571.

This opinion, we believe, has been generally acquiesced in, and the doctrine is reasonable, simple, and convenient. For reason points out that, in order to constitute an acceptance, there ought to be a bill in existence which could be accepted; and to hold that the same act would be an acceptance or not, according to the subsequent contingency of the holder of the bill having notice of it, would introduce a strange anomaly and confusion into the relation of the parties to the bill, the drawee being an acceptor as to some and not as to other indorsees. No subsequent case appears to have cast any doubt upon the propriety of Lord Kenyon's *dictum*. That of Lord Chief Justice Gibbs, in the case of *Miln v. Prest*, which was quoted in support of this application, amounts, according to the report in 4 Campb. 393, merely to this, that the authority of *Johnson v. Collings* was directly in point, there being no evidence of any communication to the plaintiff of the promise to accept. The report in Holt's *Nisi Prius Cases* is evidently inaccurate.

It is said, however, that in America the rule is otherwise; and if it had appeared from the decisions in other countries, that this was a part of the law-merchant, we should have given due weight to them. In different countries, however, a different rule seems to prevail; and, even in America, it appears from Mr. Justice Story's book on Bills of Exchange, § 249, p. 275, that in order to constitute an acceptance the promise is required to be in writing, describing the bill to be drawn in terms not to be mistaken, so as to identify it, and distinguish it from all others, and that the bill should be drawn in a reasonable time afterwards,—circumstances which do not occur in this case.

We are of opinion that the question raised in this case does not admit of such a degree of doubt as to require further discussion, and therefore refuse the rule.

*Rule refused.*¹

¹ *Ex parte Bolton*, 2 Deac. 537, *accord*.

The rule adopted in the principal case applies in the United States to *verbal* promises to pay non-existing bills. *Kennedy v. Geddes*, 8 Port. 263; *Mercantile Bank v. Cox*, 38 Me. 500, 507 (*semble*); *Plummer v. Lyman*, 49 Me. 229; *Wilson v. Clements*, 3 Mass. 1, 111 (*semble*); *Edson v. Fuller*, 22 N. H. 183, 188 (*semble*), *accord*.

Havens v. Griffin, N. Chip. 42, *contra*.

Conf. Ontario Bank v. Worthington, 12 Wend. 593, 598; *Mich. Bank v. Ely*, 17 Wend. 608, 610; *Ulster Co. Bank v. McFarlan*, 3 Den. 553, 557. — *Ed*.

1856.

[19 & 20 Vict. c. 57, § 6.]

No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December, one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.¹

¹ No person within this State shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent. 2 N. Y. Rev. Stat. (6 ed.) 1160.

The New York Statute has been adopted in several States: Rev. Code Ala. § 1840; 2 G. & C. Ark. Stat. § 549; 2 Civ. Code Cal. § 3193; Gen. Stat. Kans. c. 14, § 8; Rev. Stat. Maine, c. 32, § 10; 1 Comp. Laws, Mich. c. 31, § 7; Rev. Stat. Minn. c. 23, § 6; 1 Wagn. Stat. Mo. c. 18, § 1; Gen. Laws Oreg. c. 48, § 7; 1 Stat. Wis. c. 60, § 7. — ED.

1878.

[41 & 42 Vict. c. 13, § 1.]

Whereas by the Mercantile Law Amendment Act, 1856, and the Mercantile Law Amendment Act (Scotland), 1856, it is enacted that "no acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorized by him."

And whereas doubts have arisen as to the true effect and intention of the said enactment, and as to whether the signature of the drawee alone can constitute a sufficient acceptance of the bill so as to satisfy the requirements of the said statute, and it is expedient that the meaning of the said enactment should be further declared:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: —

An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill.

COOLIDGE AND OTHERS v. PAYSON AND OTHERS.

IN THE SUPREME COURT, UNITED STATES, FEB. 21, 1817.

[Reported in 2 Wheaton, 66.]

THIS cause was argued by *Mr. Swann*, for the plaintiff in error, and by

Mr. Winder, for the defendant.

MR. MARSHALL, C. J., delivered the opinion of the court.

This suit was instituted by Payson & Co., as indorsees of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co., as the acceptors.

At the trial, the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial, it appeared that Coolidge & Co. held the proceeds of part of the cargo of the "*Hiram*," claimed by Cornthwaite & Cary, which had been captured and libelled as lawful prize. The cargo had been acquitted in the District and Circuit Courts, but from the sentence of acquittal the captors had appealed to this court. Pending the appeal, Cornthwaite & Co. transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore with scrolls in the place of seals, and drew on them for \$2,700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co., and protested for non-acceptance. After its protest, Coolidge & Co. wrote to Cornthwaite & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say, "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your State. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this

mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for \$2,000 will be honored."

On the same day, Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say, "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which we shall wholly rely on your judgment. You mention the last surety as being responsible: what think you of the others?"

In his answer to this letter, Williams says: "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals, I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter-book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwaite & Cary, and paid to Payson & Co. in part of the protested bill of \$2,700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the court instructed the jury that, if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution as to the sufficiency of the obligors to pay the same; and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover in

the present action ; and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part-payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him.

To this charge, the defendants excepted. A verdict was given for the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Cary contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this : Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favor of a person who takes it for a pre-existing debt ?

In the case of *Pillans and Rose v. Van Mierop and Hopkins*,¹ the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case and that under the consideration of the court, no essential distinction is perceived. But it is contended that the authority of the case of *Pillans and Rose v. Van Mierop and Hopkins* is impaired by subsequent decisions.

In the case of *Pierson v. Dunlop et al.*,² the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by

¹ 3 Burr. 1663.

² Cowp. 571.

Lord Mansfield, in delivering his opinion, contradict those laid down in *Pillans and Rose v. Van Mierop and Hopkins*. His Lordship observes, "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying 'he will duly honor it,' is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement ; but, if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of *Pillans and Rose v. Van Mierop and Hopkins* had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of *Pierson v. Dunlop* certainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued that those circumstances to which Lord Mansfield alludes must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," &c. The answer must be "accompanied with circumstances;" but it is not said that the answer must contain those circumstances. In the case of *Pierson v. Dunlop*, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept, as an acceptance, is that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and, if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of *Mason v. Hunt*,¹ Lord Mansfield said: "There is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee, or any other

¹ Doug. 206.

person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange"? It is the promise to accept, — the naked promise. The motive to this promise need not, and cannot be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But, in the case of *Pillans v. Van Mierop*, the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would unquestionably affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of *Johnson et al. v. Collins*, Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. In the case of *Johnson v. Collins*, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorsee. Consequently, the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Lord Mansfield, in the case of *Pierson v. Dunlop*; and Lord Kenyon said that "this was carrying the doctrine of implied acceptances to the utmost verge of the law; and he doubted whether it did not even go beyond it." In *Clarke et al. v. Cock*,¹ the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter, to be a virtual acceptance. It is true, in

¹ 4 East, 57.

the case of *Clark v. Cock*, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction; and, in *Pillans and Rose v. Van Mierop and Hopkins*, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept as an acceptance is that credit is thereby given to the bill. Now this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court; and it is affirmed with costs.¹

*Judgment affirmed.*²

¹ The same point was held by Gibbs, C. J., in *Miln v. Prest*, 1 Holt, Rep. 181.

² "It is perhaps to be lamented that the doctrine of such virtual acceptance ever was established; and, if the question had been entirely new, I am well satisfied that it would not have been recognized as fit to be promulgated by that court, it being at once unsound in policy and full of inconvenience. But the Supreme Court yielded, as did the judge, who decided that case in the Circuit Court, to what seemed at that time the true result of the English authorities upon an important practical commercial question" *Per Story, J., Wildes v. Savage*, 1 Story, 27. See also *Greele v. Parker*, 5 Wend. 419, *per Walworth, C.*; *Espy v. Cinn. Bank*, 18 Wall. 620. But conf. *Russell v. Wiggin*, 2 Story, 229, where Story, J., uses the following language: "I say it would be no matter of surprise to me that the courts of England should, whenever the question shall again arise, go back to the doctrine of Lord Mansfield in *Pillans v. Van Mierop* (3 Burr. 1663), and *Pierson v. Dunlop* (Cowp. R. 571), as founded in a wholesome, nay, necessary justice, to prevent gross frauds, and manifest and irretrievable mischief in the intercourse of the commercial world." The doctrine of the principal case has been universally followed in the United States.

Payson v. Coolidge, 2 Gall. 233; *De Tastett v. Crousillat*, 2 Wash. C. C. 132; *Rimsdyk v. Kane*, 1 Gall. 630 (*semble*); *Ogden v. Gillingham*, 1 Baldw. 38; *Bayard v. Lathy*, 2 McL. 462; *Naglee v. Lyman*, 14 Cal. 450 (statutory); *Beach v. State Bank*, 2 Ind. 488 (*semble*); *Gates v. Parker*, 43 Me. 544; *McKim v. Smith*, 1 Hall, L. J. 486; *Banorgee v. Hovey*, 5 Mass. 11, 23, 29, 38 (*semble*); *Storer v. Logan*, 9 Mass. 55; *Carnegie v. Morrison*, 2 Met. 381, 406 (*semble*); *Central Bank v. Richards*, 109 Mass. 413; *Lathrop v. Harlow*, 23 Mo. 209 (statutory); *Goodrich v. Gordon*, 15 Johns. 6; *Parker v. Greele*, 2 Wend. 545; 5 Wend. 414, s. c.; *Mich. Bank v. Ely*, 17 Wend. 508 (statutory); *Burns v. Rowland*, 40 Barb. 368; *Barney v. Worthington*, 37 N. Y. 112; *Johnson v. Clark*, 39 N. Y. 216; *Merch. Bank v. Cardozo*, 35 N. Y.

SPAULDING v. ANDREWS.

IN THE SUPREME COURT, PENNSYLVANIA, 1864.

[Reported in 48 Pennsylvania Reports, 411.]

THIS was an action of *assumpsit*, by Emanuel Andrews, indorsee of Asa Oliver, against H. C. Spaulding.

The plaintiff declared on a parol acceptance by defendant of an inland bill of exchange, drawn by Z. H. Lambert, on the plaintiff, May 10, 1861, at four months, for \$174.49, to which the defendant pleaded *non assumpsit* payment, payment with leave, and set-off, and in which there was a verdict and judgment for plaintiff. The case is fully stated in the opinion of the court.

George W. Youngman, for plaintiff in error.

R. P. Allen and *J. W. Wood*, for defendant in error.

The opinion of the court was delivered, March 6, 1865, by

STRONG, J. The plaintiff in error was sued by an indorsee, upon an alleged parol acceptance of an inland bill. The evidence of acceptance was, that soon after the bill was drawn, the payee, who was then the holder, presented it for acceptance, and received for answer from Spaulding, the drawee, that it was contrary to his mode of business to accept a draft. When told what the payee wished to do with the bill, and urged to accept it in writing, Spaulding replied that it was not his custom to accept in writing, his word was as good as writing, and that the draft would undoubtedly be paid at its maturity. Soon after, when again applied to for an acceptance in writing, he replied, "The draft would be paid at maturity. You know me, and you may rely upon it, the draft will be paid; it will certainly be paid at maturity;"

Sup'r C. 162; *Molson Bank v. Howard*, 40 N. Y. Sup'r C. 15; *Steman v. Harrison*, 42 Pa. 49; *Kendrick v. Campbell*, 1 Bail. 522 (*semble*).

See opinions of English counsel, 2 Story, 219, 220, *contra*.

The rule announced in the principal case was recognized also in *Wilson v. Clements*, 3 Mass. 1, when the bill was not drawn within a reasonable time — in *Lewis v. Kramer*, 3 Md. 265; *M'Evers v. Johnson*, 10 Johns. 207, where the promise was not communicated to the plaintiff — in *Wildes v. Savage*, 1 Story, 22, where Story, J., thought that the rule did not apply to bills payable at or after sight; but see *Ulster Bank v. McFarlan*, 3 Den. 553; *Merch. Bank v. Cardozo*, 40 N. Y. Sup'r C. 15, *contra*. In *Boyce v. Edwards*, 4 Pet. 110; *Cassel v. Dows*, 1 Blatchf. 335; *Von Phul v. Sloan*, 2 Rob. (La.) 148; *Carr. Bank v. Tayleur*, 16 La. 490; *Vallé v. Cerré*, 36 Mo. 575, where letters containing a general authority to draw bills were held to contain an insufficient description of the bills to be drawn; but see *Nelson v. Nat. Bank*, 48 Ill. 36; *Bissell v. Lewis*, 4 Mich. 450. — In *Ulster Bank v. McFarlan*, 3 Den. 553, where the authority of the drawee was exceeded; but compare *Burns v. Rowland*, 40 Barb. 368. — ED.

adding, "he had a running account with the drawer, and there would be funds in his hands before the draft matured." When first applied to, he also said, "he would take a memorandum of the draft and place it to the account of Lambert" (the drawer). After this evidence had been given, the court permitted the draft to be laid before the jury, and instructed them that if they believed Spaulding promised to pay the draft at maturity, the plaintiff (who became an indorsee after this alleged parol acceptance) was entitled to recover. In all this there is no error of which the plaintiff in error can complain. That a parol acceptance of a bill is binding upon the acceptor, in all cases not regulated by statute, is beyond doubt; and that a promise to pay a draft when it shall mature is an acceptance, is equally certain. Nor can it be doubted that the evidence of acceptance in this case was exceedingly strong and unimpeached.

It is said that, even if there was a promise to pay the draft, there was no promise to Andrews, who obtained it after the acceptance. But an acceptance is a promise to pay to any one who may thereafter become the holder. And the legal effect is the same, whether it be in parol or in writing. Nor does it make any difference *when* a parol acceptance is given, if it be after the bill is drawn. It enures to the benefit of all parties to the bill. It may be given to the drawer or any other party to the bill, after it has been indorsed away, and even after it has become due. It may even be given to a person by whose direction and on whose account the bill was drawn, though he be no party to the bill, and although the bill had been previously indorsed. See Byles on Bills, 147-8, and cases cited, especially *Fairlee v. Herring*.¹ If a bill comes into a man's hands with a parol acceptance, though he does not know of that acceptance, he may avail himself of it afterwards when it comes to his knowledge. If not, then he has not all the advantages previous holders had.

Of course, if there was an acceptance of the bill, it was not a promise to pay the debt of another. The acceptor is the primary debtor, and the Statute of Frauds does not require his engagement to be in writing.

*Judgment affirmed.*²

¹ 3 Bing. 625.

² Conf. *Fairlee v. Herring*, 3 Bing. 625; *Jones v. Council Bluffs Bank*, 34 Ill. 313, where the defendant was held liable as acceptor, although the verbal promise to accept the bill was made to the drawer after the bill had been negotiated to the plaintiff. — Ed.

EXCHANGE BANK OF ST. LOUIS v. GEORGE W. RICE
AND ANOTHER.IN THE SUPREME COURT OF JUDICATURE, MASSACHUSETTS,
NOVEMBER, 1867.*[Reported in 98 Massachusetts Reports, 288.]*

GRAY, J. The plaintiffs in this action seek to recover the amount of a bill of exchange for \$3,300. The material facts appearing by the report of the judge, before whom (a trial by jury having been waived) the case was tried in the Superior Court, are as follows :—

The bill was drawn by John P. Hill, at St. Louis, on the 8th of March, 1865, upon the defendants at Boston, “against twelve bales of cotton” (as was stated in a memorandum at the foot of the bill), and payable in thirty days from date to the order of Pitman & Co., and on the day of its date was discounted by the plaintiffs and indorsed to them by the payees. On the same day, Hill wrote to the defendants, informing them of the drawing of the bill and the forwarding of the cotton. On the 14th of March the defendants wrote in reply, saying: “Your shipment of twelve bales of cotton will receive due attention. Bill of lading not at hand. Your draft for \$3,300 is excessive, particularly as we shall have no margin on previous shipments as the market now looks. We will honor the same, but shall expect you, on receipt of this, to make us shipment of cotton to cover the margin.” On the 15th of March, the bill was presented by the plaintiffs to the defendants, and noted for non-acceptance, and the defendants wrote to Hill that this had been done because they had received no bill of lading, and added, “When bill of lading is received, will accept draft.” The bill of lading was in terms for the delivery of the twelve bales to the defendants or order, and was sent on the 12th and received by them on the 17th of March. The defendants, on the same day, wrote to Hill and to Pitman & Co. that they should not honor the bill unless additional cotton should be sent them to meet unaccepted bills, and informed Pitman & Co. that they had telegraphed to Hill; and on the same day Pitman & Co. wrote to the defendants that they were advised of the protest for non-acceptance of this bill. On the 22d of March, the defendants’ letter of March 15 was shown by Pitman & Co. to the plaintiffs, who procured of them the letter and the duplicate bill of lading, and on the 27th of March again presented the bill, with these documents, to the defendants, and protested it for non-acceptance, and on the 10th of

April for non-payment. The defendants subsequently received the cotton, sold it, and credited Hill with the amount in general account.

The judge found, as matter of fact, that the plaintiffs, in discounting the bill, relied on the memorandum thereon, as well as on the names of the parties thereto; and held, as matter of law, that the defendants by their letter of March 15, whether taken by itself or in connection with the whole correspondence, absolutely promised to accept the bill when the bill of lading should be received; and that upon the receipt of the bill of lading the defendants became liable as acceptors of the bill, and gave judgment for the plaintiffs for the amount thereof, with interest. The defendants alleged exceptions.

It has long been well settled, though it has often been regretted that it should not originally have been held otherwise, that, in the absence of any statute prescribing a different rule, the acceptance of a bill of exchange need not be by writing upon the bill itself, but that a separate written or even oral promise by the drawee to the holder binds the drawee as an acceptance which he is estopped to deny. *Wilkinson v. Lutwidge*,¹ *Lumley v. Palmer*, *Ward v. Allen*,² *Wells v. Brigham*.³ It is equally well settled that an acceptance, otherwise sufficient, is not the less so by reason of a previous refusal to accept and protest for non-acceptance. *Grant v. Shaw*.⁴ And an acceptance may be conditional, and become absolute when the condition is performed. *Coolidge v. Payson*, *United States v. Bank of the Metropolis*,⁵ *Grant v. Shaw*.⁶

Under what circumstances, a promise to accept, contained in a letter to the drawer, will enure as an acceptance to the benefit of the holder, is a question upon which there has been a divergence between the English and American courts since the time of Lord Mansfield.

Where drawees were sought to be charged as acceptors of a bill of exchange by reason of a letter from them to the plaintiffs to whom the bill had been previously indorsed, Lord Mansfield said, "It has been truly said as a general rule that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement." *Pierson v. Dunlop*.⁷ And in an action against the drawees as acceptors on a promise to accept in a letter written to the drawer before the drawing of the bill sued on, he said: "There is no doubt but an agreement to accept may amount to an acceptance, and it may be couched in such words as to put a third person in a better position than the drawer. If a man, to

¹ 1 Stra. 648.

² 2 Met. 53.

³ 6 Cush. 6.

⁴ 16 Mass. 344.

⁵ 15 Pet. 394, 395.

⁶ 16 Mass. 344.

⁷ Cowp. 573, 574.

give credit to another, makes an absolute promise to accept his bill; the drawer or any other person may show such promise upon the exchange to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might arise between the drawer and acceptor." *Mason v. Hunt*.¹ See also *Pillans v. Van Mierop*.²

These cases were formerly supposed to have settled the rule in England to be that a promise to accept even a bill not yet drawn would sustain an action by one who afterwards took the bill on the credit of the promise. *Beawes's Lex Merc. Bills of Exchange*, pl. 112; *Kyd on Bills* (1st Am. ed.), 72, 74; *Byles on Bills* (6th ed.), 145. But from the time of Lord Kenyon the tendency of the English decisions has been to hold any promise to accept a non-existing bill of exchange insufficient to support an action by an indorsee of the bill. *Johnson v. Collings*; *Ex parte Bolton*; * opinions of English counsel in 2 Story, 219, 220; *Bank of Ireland v. Archer*.

On the other hand, in the case of a promise to accept a bill already drawn, the later decisions in England have established the rule there to be that such a promise, oral or written, either to the drawer or the payee, is an acceptance upon which an indorsee who has taken the bill before the making of such promise, and of course therefore not upon the faith of it, may maintain an action; even if the drawer does not receive the letter containing the promise until after the bill becomes due, or is dead before it is written. *Wynne v. Raikes*, *Rees v. Warwick*,⁴ *Fairlee v. Herring*,⁵ *Billing v. Devaux*,⁶ *Grant v. Hunt*.⁷ These cases are all founded upon that of *Powell v. Monnier*, in which Lord Hardwicke is reported to have held that a letter written by the drawee to the drawer, saying that the bill should be duly honored and placed to his debit, showed an acceptance upon which a previous indorsee might maintain an action. It is to be observed that it does not appear, either by the report in *Atkins*, or by that since published with additions from Lord Hardwicke's own note-book, in *West*, Ch. 68, that any objection on the ground that the promise was not made or communicated to the plaintiffs was raised or considered; and that the earlier cases to which Lord Hardwicke referred as conclusive authorities were of oral or written promises made directly to the holder. If the decision went as far as has been understood in the later English cases, it is somewhat remarkable that it was not cited in

¹ 1 Doug. 299.

² 3 Burr. 1667, 1669, 1672, 1673.

³ 2 Deacon, 537; s. c. 3 Mont. & Ayr. 367.

⁴ 2 B. & Ald. 115.

⁵ 3 Bing. 625; s. c. 11 Moore, 520.

⁶ 3 M. & G. 565; s. c. 4 Scott, N. R. 175.

⁷ 1 C. B. 44.

any of the cases before Lord Mansfield, and that he laid down a narrower rule.

In *Coolidge v. Payson*, Chief Justice Marshall, who delivered the unanimous opinion of the Supreme Court of the United States, affirming the judgment of Mr. Justice Story in 2 Gallison, 238, after carefully examining the opinions of Lord Mansfield, and alluding to a distinction suggested between bills drawn before and after the date of the promise, said: "The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept as an acceptance is that credit is thereby given to the bill. Now this credit is given as entirely by a letter written before the date of the bill as by one written afterwards. It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." This rule has since been repeated in the same words by the Supreme Court, and by Justices Story, McLean, and Nelson on the circuit. *Schimmelpennich v. Bayard*,¹ *Boyce v. Edwards*,² *Wildes v. Savage*,³ *Russell v. Wiggin*,⁴ *Bayard v. Lathy*,⁵ *Cassel v. Dows*.⁶ As applied to non-existing bills, it corresponds with the rule previously stated and since affirmed by this court and by the Supreme Court of New York. *Wilson v. Clements*,⁷ *Storer v. Logan*,⁸ *McEvers v. Mason*,⁹ *Goodrich v. Gordan*,¹⁰ *Parker v. Greele*,¹¹ *Carnegie v. Morrison*,¹² *Murdock v. Mills*.¹³ It is true that all these cases were of promises to accept non-existing bills, and did not necessarily involve any question upon promises to accept bills already drawn. But the general rule laid down by the Supreme Court of the United States in terms includes letters written within a reasonable time "before or after" the bill; is adopted in the same form by Chancellor Kent in his Commentaries; has been applied, with all its limitations, as a rule of the general law-merchant to promises of the drawee to the drawer to accept bills already drawn, by the Supreme Courts of New York and New Jersey, and, with some qualification, Pennsylvania; and has been affirmed in New York and Missouri, and perhaps in other States,

¹ 1 Pet. 284.² 4 Pet. 121.³ 1 Story, 27.⁴ 2 Story, 234-237.⁵ 2 McLean, 463.⁶ 1 Blatchf. C. C. 341.⁷ 3 Mass. 10, 11.⁸ 9 Mass. 58, 59.⁹ 10 Johns. 207.¹⁰ 15 Johns. 6.¹¹ 2 Wend. 545; s. c. 5 Wend. 414.¹² 2 Met. 406.¹³ 11 Met. 5.

by statute; ¹ 3 Kent Com. (1st ed.) 55; (6th ed.) 84; *Ontario Bank v. Worthington*,² *Bank of Michigan v. Ely*,³ *Overman v. Hoboken City Bank*,⁴ *Howland v. Carson*,⁵ *Steman v. Harrison*; ⁶ Rev. Sts. of N. Y. (5th ed.) pt. 2, c. 4, tit. 2, §§ 6-10; Gen. Sts. of Missouri, c. 86, §§ 1-5. The only American case to which we have been referred, in which an action has been maintained by the holder of a bill upon a separate promise to accept, made not to him, after he took the bill, is that of *Read v. Marsh*.⁷

The rule generally adopted by the American courts in such a case is analogous to that by which the signer of a letter of credit has been held liable to those drawing bills or advancing money upon the faith of it. *Molloy*, B. II. c. 10, § 36; *Pillans v. Van Mierop*,⁸ *Boyce v. Edwards*,⁹ *Russell v. Wiggin*,¹⁰ *Carnegie v. Morrison*,¹¹ *Barney v. Newcomb*,¹² *In re Agra & Masterman's Bank*.¹³

The difference of opinion between the American and the English courts upon a question of commercial law, affecting the right of action upon negotiable instruments which pass freely between the two countries, is much to be regretted. But in view of the peculiar importance of maintaining consistency and harmony in the decisions of the various courts, state and national, throughout the United States, it is clearly our duty to follow the rule deliberately announced by the Supreme Court of the United States more than half a century ago, and ever since recognized and affirmed by the American authorities, with hardly an exception. The American rule has the advantages of being uniform in its application to all promises to accept a particular bill, not made to the holder or written on the very bill, whether made before or after it is drawn; and of restricting within the narrowest limits the anomalous doctrine of liability to an action upon negotiable

¹ § 7. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, on the faith thereof, shall have received the bill for a valuable consideration.

§ 8. An unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration. 2 N. Y. Rev. (6th ed.) Stat. 1160.

For similar provisions in other States, see G. & C. Ark. Stat. §§ 550, 551; 2 Civ. Code Cal. §§ 3196, 3197; Gen. Stat. Kans. c. 14, §§ 9, 10; 1 Wagn. Stat. Mo. c. 18, §§ 2, 3.

Conf. Rev. Code Ala. § 1841. — Ed.

² 12 Wend. 593.

³ 17 Wend. 510, 511.

⁴ 1 Vroom, 68.

⁵ 15 Penn. State, 453.

⁶ 42 Penn. State, 49.

⁷ 5 B. Monr. 8.

⁸ 3 Burr. 1663.

⁹ 4 Pet. 111.

¹⁰ 2 Story, 213.

¹¹ 2 Met. 381.

¹² 9 Cush. 45.

¹³ Law Rep. 2 Ch. 397

paper, by reason of any thing not appearing on the face of the paper itself.

In this case, the bill of exchange, when negotiated to the plaintiffs, was not accompanied by the bill of lading of the goods consigned to the defendants. The memorandum at the foot of the bill of exchange, that it was drawn against twelve bales of cotton, can have no more effect to charge the defendants as acceptors than the mere signature of the drawer, which of itself always implies a promise by him that he has funds in the hands of the drawee. The letter of March 15, having been written after the plaintiffs took the bill of exchange now sued on, and not addressed to them, did not make the defendants liable to them as acceptors of the bill. The ruling of the Superior Court was therefore erroneous, and, as it appears to have been based exclusively upon the assumption that the defendants were liable as acceptors, its finding must be set aside.

Upon the question whether the defendants, by reason of the subsequent receipt of the bill of lading and of the cotton therein mentioned, or of any other facts which were or might be proved, can be held liable in any other form, and, if so, for what amount, no ruling appears to have been made by the court below, and no opinion is expressed by this court.

*Exceptions sustained.*¹

¹ *Lugrue v. Woodruff*, 29 Ga. 648; *Worcester Bank v. Wells*, 8 Met. 107 (statutory); *Ontario Bank v. Worthington*, 12 Wend. 593 (statutory); *Howland v. Carson*, 15 Pa. 453; *Strohecker v. Cohen*, 1 Speers, 349, *accord.* — ED.

SECTION III.

No One but the Drawee can accept a Bill, except for Honor.

JACKSON v. HUDSON.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 7, 1810.

[*Reported in 2 Campbell, 447.*]

THIS was an action against the defendant as acceptor of a bill of exchange, which was drawn and accepted in the following form:—

“LONDON, Dec. 30, 1809.

“Two months after date, pay to my order £157, for value received.
F. JACKSON.

“TO MR. I. IRVING.

“Accepted. I. IRVING.

“Accepted. JOSEPH HUDSON.

“Payable at Mr. Hudson’s, 132 Oxford Street.”

The first count of the declaration stated that the bill was directed to Irving; the second took no notice of there being any drawee; and both averred that the defendant accepted it, “according to the usage and custom of merchants.”

Garrow, for the plaintiff, stated, and undertook to prove, that the plaintiff, having dealings with Irving concerning the sale of goods, refused to sell him any more, unless the defendant would become his surety; that the defendant agreed to this; that goods to the value of £157 were, in consequence, sold by the plaintiff to Irving; that the bill in question was drawn for the price of them; and that the defendant, with a knowledge of all these facts, had put his name upon the bill as acceptor. He must therefore be considered as having accepted the bill jointly with Irving; and, as he had not pleaded in abatement, he was separately liable in the present action.

LORD ELLENBOROUGH. If you had declared that, in consideration of the plaintiff selling the goods to Irving, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. But I know of no custom or usage of merchants, according to which, if a bill be drawn upon one man, it may be accepted by two. The acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by some one for the honor of the drawer. There cannot

be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such.

*Plaintiff nonsuited.*¹

DAVIS v. HENRY JOHN CLARKE.

IN THE QUEEN'S BENCH, MAY 24, 1844.

[*Reported in 6 Queen's Bench Reports, 16.*]

ASSUMPSIT. The first count stated that "one John Hart," on 8th March, 1838, "made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to him or his order £100," value received, at twelve months after date, which had elapsed before the commencement, &c.; "and the defendant then accepted the said bill, and the said John Hart then indorsed the same to the plaintiff;" averment of notice to defendant, promise by him to pay plaintiff, and that he did not pay.

There was also a count on an account stated.

The first plea denied the acceptance; the second, the promise; the third alleged a discharge of defendant by the Insolvent Debtors' Court.

The replication joined issue on the first two pleas, and traversed the discharge alleged in the third; on which traverse issue was joined.

On the trial before Parke, B., at the Essex summer assizes, 1843, a written paper, in the following terms, was given in evidence on behalf of the plaintiff:—

"£100.

LONDON, 8th March, 1838.

"Twelve months after date, pay to me or my order one hundred pounds, value received.

"TO MR. JOHN HART.

JOHN HART."

Across the face of this instrument was written

"Accepted.

"H. J. CLARKE.

"Payable at 319 Strand."

This was proved to be in the defendant's handwriting.

¹ Polhill v. Walter, 3 B. & Ad. 114; Bult v. Morrell, 12 A. & E. 745; Okell v. Charles, 34 L. T. Rep. 822; May v. Kelly, 27 Ala. 497; Walton v. Williams, 44 Ala. 347; Smith v. Lockridge, 8 Bush, 423; Rice v. Ragland, 10 Humph. 545 (*semble*), *accord*.

Markham v. Hazen, 48 Ga. 570, *contra*. — Ed.

No other evidence being produced, the learned Baron directed a nonsuit.¹ In Michaelmas term, 1843, Petersdorff obtained a rule *nisi* for a new trial.

Sir F. Thesiger, Solicitor-General, now showed cause. The defendant has not accepted the bill described in the declaration: the instrument produced is indeed no bill of exchange. In *Gray v. Milner*, where the instrument was not addressed to any one, but had only a place of payment added, and in other respects resembled the document here proved, the acceptor was held liable, as having admitted himself, by the acceptance, to be the party pointed out by the place of payment. Here the drawer addresses himself; and the instrument more nearly resembles a promissory note. It may be that the defendant might have been sued as a surety.

Petersdorff, contra. The principle of *Gray v. Milner* applies. The defendant, by his acceptance, estops himself from disputing his own character and the nature of the instrument. In *Polhill v. Walter*,² indeed, it was said that no one could be liable as acceptor, unless he were the person to whom the bill was addressed, or an acceptor for honor. But the question of acceptance in this form was not then distinctly before the court. Here it may be contended that the defendant identifies himself as the person addressed under the name of John Hart. The judge, at *nisi prius*, was requested, but refused, to allow an amendment, by calling the instrument a promissory note made by the defendant; the writing the name was a new making, according to the principle of *Penny v. Innes*. (He referred also to *Jackson v. Hudson*.)

LORD DENMAN, C. J. There is no authority, either in the English law or the general law-merchant, for holding a party to be liable as acceptor upon a bill addressed to another. We must take it on this instrument that the defendant is different from the party to whom it is addressed. *Polhill v. Walter*³ and *Jackson v. Hudson* are authorities showing that the defendant here cannot be sued as acceptor. In *Jackson v. Hudson*, Lord Ellenborough treated an acceptance by a party not addressed as "contrary to the usage and custom of merchants."

PATTESON, J. No previous case seems to be exactly like this. In *Jackson v. Hudson*, there was one acceptance by the party to whom the bill was addressed, prior to the acceptance by the defendant. In *Gray v. Milner*, no party was named in the address; and I must say that the decision in that case appears to me to go to the extremity of

¹ *Davis v. Clarke*, 1 C. & K. 177. — ED.

² 3 B. & Ad. 114.

³ 3 B. & Ad. 114.

what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed. But here another person, the drawer himself, is named in the address. I do not know that a party may not address a bill to himself, and accept, though the proceeding would be absurd enough. Then it is said that the defendant is estopped; but that cannot be supported where the instrument shows, on its face, that he cannot be the acceptor.

WILLIAMS, J. The only question is, whether the defendant is such an acceptor as is described in the declaration; that is, of a bill of exchange directed to him. No doubt this can be so only where he is the drawee; but here the bill is not addressed to the defendant at all. This is, therefore, not an acceptance within the custom of merchants.

COLERIDGE, J. The safe course is to adhere to the mercantile rule, that an acceptance can be made only by the party addressed, or for his honor. Here the last is not pretended; and the first cannot be presumed. If the John Hart addressed is different from the John Hart who draws, there is still no acceptance: if the same, then the instrument is a promissory note, and not a bill of exchange.

Rule discharged.

OWEN v. VAN USTER.

IN THE COMMON PLEAS, NOV. 11, 1850.

[Reported in 20 Law Journal Reports, 61.]

ASSUMPSIT on a bill of exchange.

The declaration stated that the plaintiff, on the 26th of April, 1850, made his bill, and directed it to the defendant, and required the defendant to pay to the order of the plaintiff in London £100, three months after date, and that the defendant accepted the said bill, &c.

Plea: that the defendant did not accept.

At the trial before Cresswell, J., at the sittings at Guildhall, in Michaelmas term, 1850, the bill was produced. It was directed to "The Allty Crib Mining Company, near Talybout, Aberystwith," and was accepted "For the Allty Crib Mining Company. Payable at Messrs. Williams, Deacon, & Co.'s. W. T. Van Uster, manager."

On the part of the defendant, it was submitted that this acceptance did not bind the defendant, because he had no authority to accept;

and the case of *Leadbitter v. Farrow*¹ was cited. A witness was called to prove that the defendant was a shareholder in the company; and he stated that the defendant and other three persons arranged that there should be a company, consisting of those four; and the mine was afterwards worked on that footing.

The learned judge asked *Byles*, Serjt., for the plaintiff whether there was not a variance, and whether he would not wish to amend; and *Byles*, having elected not to amend, the judge told the jury that the only question for them was, whether the defendant had accepted or not. The jury found a verdict for the plaintiff, with £101 9s. damages.

Kingdon now, on behalf of the defendant, moved for a rule *nisi* for a new trial, on the grounds of misdirection, and that the verdict was against evidence.² The acceptance was not according to the tenor of the bill. The action ought to have been brought against the defendant for misrepresenting that he had authority to accept the bill. There is no case precisely in point; but, in *Polhill v. Walter*,³ an action was brought by the indorsee against the acceptor of a bill for falsely representing that he had authority to accept by procuration, and was held maintainable, although there was no fraud in fact. Lord Tenterden, in giving judgment in that case, says that no one can be liable as acceptor but the person to whom the bill is addressed, unless he be an acceptor for honor. *Davis v. Clarke* confirms the principle laid down in *Polhill v. Walter*. *Ex parte Buckley*,⁴ *Wilson v. Barthrop*,⁵ and *Jenkins v. Hutchinson*,⁶ are authorities to show that the defendant is not liable.

[MAULE, J. You say that the defendant signs for four persons; and that, in an action on the bill, he can plead that he did not accept, and under that plea can show that he had no authority from the others. Suppose each of the four had accepted, and an action was brought against one, could that one say that he did not accept?]

The defendant purports to accept by procuration, and does not represent himself to be a member. There are many cases which show that, when a party takes bills accepted by procuration, he has notice to make inquiries as to the authority of the acceptors.

JERVIS, C. J. I am of opinion that there should be no rule in this case. The action is brought on a bill of exchange, addressed to the

¹ 5 M. & S. 345.

² Only so much of the case is given as relates to the question of misdirection. — ED.

³ 3 B. & Ad. 114; s. c. 1 Law J. Rep. (N. S.) K. B. 92.

⁴ 14 Mee. & W. 469; s. c. 14 Law J. Rep. (N. S.) Exch. 341.

⁵ 2 Ibid. 863; s. c. 6 Law J. Rep. (N. S.) Exch. 251.

⁶ 18 Law J. Rep. (N. S.) Q. B. 274.

Alty Crib Mining Company, and accepted by the defendant on their behalf, in his own name, as the London manager. The form of acceptance being by procuration, the defendant could not be charged with a personal responsibility on that account. The question then arises, whether the defendant is liable, under the acceptance, as a member of the company. Now it seems, from the recent authorities, although it was doubted at one time whether a person accepting a bill on a false assumption of authority was personally liable on the bill, that the acceptance of one, when a bill is addressed to several, is sufficient to bind that one.

MAULE, J. I am of the same opinion. The cases have been fully looked into, and their effect pointed out. Some of the cases referred to are express authorities to show that a bill being drawn upon four and accepted by one of the four, he is liable upon it. I do not think that the bill is vitiated by the defendant's misrepresentation. It may give the plaintiff another kind of action, if he choose to sue the defendant for representing that he had authority; but I do not think it deprives him of his action, as if the acceptance was a simple acceptance in his own name.

WILLIAMS and TALFOURD, JJ., concurred.

*Rule refused.*¹

¹ Heenan v. Nash, 8 Minn. 407, *contra*.

Conf. Penrose v. Martyr, E. B. & E. 499; Okell v. Charles, 34 L. T. Rep. 422.

Similarly if an agent upon whom a bill is drawn accepts the same in behalf of a partnership or unincorporated company of which he is himself a member, he will be bound by the acceptance. Nicholls v. Diamond, 9 Ex. 154 (a bill addressed to "Mr. James Diamond, Purser, West Downs Mining Co.," and accepted thus: "James Diamond, acceptor, per proc. West Downs Mining Co.").

But if an agent upon whom a bill is drawn accepts the same solely on behalf of another person, or in behalf of a corporation, he will not be liable on the acceptance. Walker v. State Bank, 5 Seld. 582 (a bill addressed to E. C. H., who wrote upon its face, "Accepted, Empire Mills, by E. C. H., Treas."). But, as it is impossible to charge the principal on such a bill, the language of the acceptance must distinctly show a disclaimer of personal liability. Mare v. Charles, 5 E. & B. 978, where a drawee who wrote upon the bill, "Accepted for the company, W. C.," was held liable as acceptor, although not himself a member of the company. Herald v. Connah, 34 L. T. Rep. 885, is to the same effect. See Bruce v. Lord, 1 Hilt. 247; Webster v. McCalman, June 3, 1848 (Court of Session.). — ED.

SECTION IV.

An Acceptance is complete without Delivery.

BENTINCK v. DORRIEN AND ANOTHER.

IN THE KING'S BENCH, FEBRUARY 7, 1805.

[*Reported in 6 East, 199.*]

THE plaintiff brought an action as indorsee of a bill of exchange against the defendants as acceptors, which action was referred to *Mr. Sergeant Bayley*; who reciting in his award that it appeared to him that the said bill, drawn by *Mr. Rygerbos* of the Hague, on the defendants in London, was left by the plaintiff, to whom it had been indorsed, for acceptance with the defendants on the 31st of May last, and that they had signed an acceptance thereon; but that on the 1st of June following, and before the bill was called for, they had cancelled that acceptance; and that also it appeared to him, the arbitrator, upon the production of the bill, that the plaintiff had caused it to be noted for non-acceptance; was thereupon of opinion that the plaintiff by such noting it for non-acceptance had precluded himself from insisting that the defendants had by law bound themselves to pay the bill, and therefore awarded for the defendants. A rule *nisi* was obtained on a former day for setting aside the award as bad on the face of it, upon the ground that an acceptance of a bill once made could not be retracted in point of law; which rule

Laroes was now called upon to support, who contended for the general principle that acceptance of a bill could not be gotten rid of by cancellation; for, as soon as the acceptance was written, third persons acquired an interest in it, which could not be divested by the subsequent act of the acceptors alone. And he referred to the Hamburg ordinance, where that is laid down; and which had been recognized to be the law of merchants here in a case of *Tummer v. Oddie*, sittings after Easter term, 1800; where a bill having been left for acceptance, and once accepted, but the acceptance was afterwards cut off, and the bill returned in that mutilated state, Lord Kenyon, C. J., was clearly of opinion that the acceptance once made could not be revoked, and that the acceptor was still bound. [And in answer to an observation by the Court, that the plaintiff himself had agreed to treat it as a non-accepted bill, he said,] that the protesting the bill for non-acceptance was the act of the notary, and a wrong conclusion of

his in point in law, which ought not to prejudice the plaintiff, if by law the acceptance is in force.

LORD ELLENBOROUGH, C. J. The rule is certainly laid down in the Hamburg ordinance, as stated, that an acceptance once made cannot be revoked; though to be sure that leaves the question open as to what is an acceptance, whether it be perfected before the delivery of the bill; but I should consider the general question as one of great magnitude, and worthy to be considered in the most solemn manner before it is decided that, after an acceptance once clearly made, it could be explained away by any obliteration of it *ex parte*. I can readily conceive that great inconvenience would ensue from letting in such a practice. But the difficulty here is to bring this case within the general rule of an acceptance once made; where the holder himself agrees to consider it as no acceptance, and acts accordingly by getting it protested for non-acceptance. Can he then blow hot and cold, and revoke all that he has before done as done unadvisedly, and now say that he will consider it as an acceptance? I was struck at first with consideration how far this might affect the rights of third persons; but on further consideration, if this be an acceptance in law, notwithstanding the obliteration before delivery to the holder, it will still remain so as to such third persons. But I think that this plaintiff has concluded himself by the act of his authorized agent from contending that it is an acceptance. If the notary has acted improperly and without authority, the plaintiff has his remedy against him.

LAWRENCE, J. When the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance while it is yet in the hands of the drawee; and where he obliterates it before any communication made to the holder.

Per Curiam.

Rule discharged.

Park, who was to have showed cause against the rule, referred to *Sproat v. Mathews*,¹ where the plaintiff who had caused a bill to be noted for non-acceptance, which had been conditionally accepted, was considered to have precluded himself from afterwards insisting upon it as an acceptance.

¹ 1 Term Rep. 185.

COX AND OTHERS *v.* TROY.

IN THE KING'S BENCH, JAN. 29, 1822.

[Reported in 5 Barnewall & Alderson, 474.]

ASSUMPSIT upon a bill of exchange for £938, dated 20th May, 1820, drawn by Stephen and James Roch, upon the defendant and W. T. Robarts, since deceased, by the names and firm of Messrs. W. T. Robarts & Co., London, payable sixty-one days after sight to Michael Murphy, and indorsed by him to the plaintiffs, and alleged to have been accepted by the defendant and W. Tierney Roberts, payable at Messrs. Robarts, Curtis, & Co. The first count stated these facts, and a presentment for payment when due, and refusal to pay at Messrs. Robarts, Curtis, & Co. The second count was on a general acceptance; and the third was special, stating that the bill was delivered to the defendant and W. T. Robarts, to determine, within a reasonable time, whether or not they would accept the same; and that they promised to take due care of the same, and return the same without defacing or spoiling it, which they did not do, but returned the same bill in a defaced and injured state. The declaration also contained the usual money counts. Plea: general issue. The cause was tried at the sittings after Trinity term, 1821, before Abbott, C. J., when a verdict was found for the plaintiffs, subject to the following case. It was admitted on the trial that the bill of exchange mentioned in the declaration was drawn by Messrs. T. and J. Roch on the defendant and W. T. Robarts, since deceased, as stated in the declaration, and that the same was duly indorsed to the plaintiffs by the payee. The plaintiffs in London received the bill from Cork on the 24th May, 1820; and on the same day their clerk, by their directions, left it for acceptance at the defendant's counting-house in Old Broad Street, London, in the usual way. He did not call for it until Saturday, the 27th May, upon which day one of the defendant's clerks delivered back the bill of exchange to him without any observations being made at the time. The words, "24 May, 1820, at Messrs. Robarts, Curtis & Co., W. T. Robarts & Co.," were written upon the bill by the defendant, or some one authorized by him, whilst the same was in his custody; and the jury found by their verdict that the defendant and the said W. T. Robarts did accept the bill of exchange; but at the time the clerk redelivered the bill of exchange to the clerk of the plaintiffs, the words, "24th May, 1820, at Messrs. Robarts, Curtis, &

Co., W. T. Roberts & Co.," were inked and written over, so as with great difficulty to be deciphered. The defendant did not offer any evidence to account for the obliteration of the acceptance. The bill itself was not obliterated, or any part of it rendered illegible.

Chitty, for the plaintiff. In this case, the acceptance, when once made, could not be revoked by the defendant. It is so laid down in Marius, p. 83, although that is only a loose *dictum*. But in Molloy, B. II. c. 10, § 28, it is said that when a party has once subscribed, he cannot afterwards blot out his name. And the Hamburg ordinance lays it down in general terms, that an acceptance once made cannot be revoked. *Trimmer v. Oddy*, cited in *Bentinck v. Dorrien*, is an authority in point. There Lord Kenyon was of opinion that, if a drawee deface the bill, that makes him liable as acceptor; and, in *Thornton v. Dick*,¹ this point was expressly ruled by Lord Ellenborough. It seems, also, to have been considered as the law in *Bentinck v. Dorrien* and in *Fernandey v. Glynn*.² And it is treated as the law of France at the present day by Pardessus, a modern writer.³ In *Adams v. Lindsell*,⁴ the defendant was held to be bound by the plaintiff's acceptance of the contract, although not communicated to him. Here the jury have found that there was once an acceptance by the defendants, and, that being so, they had no right afterwards to revoke it.

Denman, contra, was stopped by the court.

ABBOTT, C. J. I am of opinion that, in this case, the defendant is

¹ 4 Esp. 270. Lord Ellenborough's language, p. 272, is as follows: "But the acceptance having been proved to have once taken place, he had no hesitation in saying that the act of acceptance was irrevocable; and that, if a party once accepted a bill of exchange, he had done the act, and could not retract. The moment the bill was accepted, he was bound, and the bill began to run; and the holder had a right to hold him to that liability which he had undertaken, and from which he, by his own act, could not discharge himself." — Ed.

² 1 Camp. 426, n.

³ The passage referred to is in the *Cours de Droit Commercial*, by J. M. Pardessus, Paris, 1814, Part II. tit. 4, c. 4, § 4, s. 1. p. 400. This writer, speaking of the effect of an acceptance, says: "Elle est irrévocable, et celui qui l'a donnée ne serait pas libre de la rayer, même du consentement de celui sur la présentation duquel la lettre auroit été acceptée, parce que l'acceptation n'oblige pas simplement l'accepteur envers le porteur; qu'elle forme également un contrat entre le tireur et l'accepteur." In the next paragraph the same learned writer says: "Cependant comme la bonne foi doit être avant tout considérée, et que la seule crainte de la fraude ne doit pas empêcher des opérations légitimes, le tiré qui auroit trop précipitamment accepté, et voudroit révoquer son acceptation avant que la lettre qui en est revêtue circule, pourroit la rayer et assurer la date et l'existence de ce changement par un protêt, ou par tout autre acte semblable, qui ne permettroit pas de croire que jamais la lettre ait circulé revêtue de l'acceptation non rayée."

⁴ 1 B. & A. 681.

entitled to judgment. It is true that the jury have found that he did accept the bill; but, connecting that finding with the other facts of the case, it does not seem to me that it means more than that, at one period, the defendant, or some one in his behalf, did write an acceptance on it, and at that time was minded to accept it. The question will then be whether, having that intention at the time, and having written his acceptance, he was at liberty, on an alteration of circumstances, to erase those words before he delivered out the bill to the holder. Upon that question there appears in the books to be some difference of opinion. In *Bentinck v. Dorrien*, Lawrence, J., says: "When the general question shall arise, it will be worth considering how that which is not communicated to the holder can be considered as an acceptance, while it is yet in the hands of the drawee, and where he obliterates it before any communication made to the holder." That expression was used, after the decision, in the cases of *Thornton v. Dick* and *Trimmer v. Oddy*. And, at a later period, in *Raper v. Birbeck*,¹ Lord Ellenborough says: "I remember Pothier, in his treatise on bills of exchange, speaking of an acceptor who has put his signature to a bill, but has not parted with it, says that before he does part with it, 'il peut changer de volonté, et rayer son acceptation.' *A fortiori*, then, a third person who cancels an acceptance by mistake shall not be held thereby to make void the bill, but shall be at liberty to correct that mistake, in furtherance of the rights of the parties to the bill." The manner in which Lord Ellenborough quotes the treatise of Pothier seems to indicate that, at that time, he did not retain the opinion which he had delivered in the case of *Thornton v. Dick*. In a case like the present, which depends on the law-merchant, the opinions of learned lawyers and the practice of foreign and commercial nations, though they cannot, strictly speaking, be quoted as authorities here, yet are entitled to very great weight and attention. When I find, therefore, that it is laid down in Pothier's treatise that a party who has given an acceptance may erase it before the bill goes out of his hands, it affords a strong argument in support of the view which I take of the question. I think the rule there laid down is far better than the one contended for by the plaintiff. I cannot perceive how the holder of a bill, or any antecedent party, is prejudiced by it; for it is to him the same thing whether, when the drawees give it back, they deliver it to him unaccepted, or whether he finds that the drawees have withdrawn their acceptance, having at one time intended to accept it, but having subsequently changed their mind. Thinking, as I do, that no prejudice can arise to the holder, or any

¹ 15 East, 20.

other parties to the bill, and that they are placed in precisely the same situation as if no acceptance was given, it seems to me that it was competent for the acceptors to erase their acceptance before they delivered out the bill, and therefore that the defendant is entitled to our judgment.

BAYLEY, J. I am of the same opinion. By the bill, the drawer requires the drawee to come under an engagement to pay it when due. The question is when the drawee comes under an engagement, whether by the act of writing something on the bill, or by the act of communicating what has been written to the holder; and I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the making a communication of what is so written, that binds the acceptor; for the making the communication is a pledge by him to the party, and enables the holder to act upon it. But, while it remains in the drawee's hands, it seems to me the acceptance is not fully binding on the person who signed it, and he is at liberty to say, before he parts with it, "I have not yet entered into an engagement to accept."

HOLROYD, J. I also think that in this case the party was at liberty to cancel his acceptance prior to the time when the bill was delivered back. In the old books, there are dicta which import that an acceptance once made cannot be revoked. In some of them it is said, any thing which amounts to an assent to pay the bill, whether in writing or otherwise, is in point of law an acceptance; and I suppose it has been on that principle that the case of *Thornton v. Dick* was determined; but the two subsequent cases seem to show that Lord Ellenborough had doubts as to his former opinion. In *Fernandey v. Glynn*, the cancelling of the check was with the view and under the idea that it would actually be paid, and in that case it was probably contended, either that the crossing or cancelling the bill amounted to actual payment, so that an action for money had and received would lie for the amount against the bankers, or that, if not, yet it was to be considered in the nature of an acceptance. Now that case seems to me to apply strongly to the present; for there, according to the usage, if a check was intended to be paid, it was cancelled; but if not, nothing was done, but it was returned to the parties from whom it was received. And when the check in that case was cancelled, it was done with the intention of payment, and not really by mistake. In consequence, however, of the large payments made in the course of the day, on account of the drawer, the bankers changed their intention; yet there the check was delivered back, and the original drawer only was considered bound to pay it. The opinion of Pothier, stated in *Raper v. Birkbeck*, is precise on this subject, and is far better

authority than the passages cited from Marius. Where a man accepts a bill, and delivers it out accepted, he must remain irrevocably bound by it. In contracts made between parties at a distance, if a man writes his acceptance, and sends it out of his hands, he cannot revoke it afterwards. I am satisfied, however, that this is not a binding acceptance on the party, having been cancelled anterior to the time when the bill was delivered back.

BEST, J. This is a question on the law-merchant, and it is desirable that that law should be the same in this as in every other commercial country. We ought, sitting here, to act according to the judgments of the courts in our own country; but, in the absence of these authorities, we may with great advantage take into our consideration the opinions of learned writers on this point. There seems to be no authority in the English law, except the case of *Thornton v. Dick*. I agree with my Lord Chief Justice, that Lord Ellenborough seems to have changed the opinion which he is reported to have delivered in that case. The passage in *Molloy* is probably applicable to the case where the bill has been delivered out, for it does not speak of cancellation, but revocation. But the authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the courts, and he is spoken of with great praise by Sir William Jones in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear, manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject. As to the opinion of Pardessus, I should understand him as rather speaking of bills delivered out accepted, and not erased. That seems to me perfectly clear from the next passage, where he says that though a man does accept a bill, still, if he cancels that acceptance before he delivers it out, that is sufficient. But, considering this as a question merely of common sense, and judging by analogy, is it not clear that the party is not bound in such a case as this? It may be said that the defendants here ought to have shown that this was done by mistake. How is it possible to do that? The thing looks like a mistake. He may have written an acceptance, and afterwards find when he has written it that it is on the wrong paper; and, not meaning to accept that bill, he does that which shows that it was his intention not to enter into such a contract. Nobody can be injured by it. When the bill goes back it is in as good a state as it came. The party is still placed in the same situation. It appears to me, therefore, not only

on authority, but on the principles of common sense, that the defendant was not bound by this as an acceptance, and that our judgment ought to be in his favor. *Judgment for the defendant.*¹

WILDE v. SHERIDAN.

IN THE QUEEN'S BENCH, MAY 7, 1852.

[Reported in 21 Law Journal Reports, 260.]

THIS was a rule obtained by the defendant calling upon the plaintiff to show cause why a writ of prohibition should not issue, prohibiting the judge of the County Court, held at Norwich, from further proceeding in this action.

The action was brought on a bill of exchange for £25, which the plaintiff had drawn at Norwich, payable to him or his order three months after date, upon the defendant, and addressed to the latter at 26 Gresham Street, London. The defendant in London wrote upon the bill, "Accepted, H. B. Sheridan, payable at Roberts & Co., bankers, London," and then sent it to the plaintiff at Norwich. The plaintiff indorsed the bill over to a third party at Norwich; but as it was dishonored at maturity it was returned to the plaintiff, and he was compelled to pay the amount of it to the indorsee. The plaintiff, thereupon, having obtained leave of the judge, sued the defendant in the county court of Norwich upon the bill.

Phipson showed cause. The judge had jurisdiction over the action. The cause of action arose at Norwich. The statute 9 & 10 Vict. c. 95, § 60, provides that by leave of the county court judge the summons may issue in the district in which the cause of action arose. Whether the contract or the breach of it be deemed the cause of action, the judge had authority to hear the case, for in either view the whole cause of action arose at Norwich. The bill was drawn at Norwich, and accepted by the defendant generally. There is no restrictive acceptance. It was, it is submitted, in point of law accepted at Norwich; for though the defendant wrote on the bill the word "accepted" in London, the acceptance was not complete until delivery of the accepted bill to the plaintiff, and this delivery took place at Norwich. The case of an indorsement is analogous. It has been decided that to constitute an

¹ *Dunavan v. Flynn*, 118 Mass. 537, *accord*.

Thornton v. Dick, 4 Esp. 270, *contra*.

See *Raper v. Birkbeck*, 15 East, 17; *Van Diemen's Bank v. Victoria Bank*, L. R. 3 P. C. 526, 537; *Xenos v. Wickham*, 33 L. J. C. P. 13, 23. — ED.

indorsement there must be a delivery as well as a writing of the name on the bill, and that the indorsement is not at the place in which he wrote his name on the bill, but in that in which he delivers it with his name on it. *Buckley v. Hann*.¹ In *Roff v. Miller*,² which may be cited on the other side, where it was said that there is jurisdiction in the judge of the district where the acceptance is written on the bill, and not where it is delivered, it was assumed that the writing the word "accepted" constituted the acceptance without any delivery. It was a case hastily decided, and it is apprehended it is against principle. Secondly, the cause of action is the breach of promise, not the making of the contract. The breach took place when the bill was not paid when due to the holder at Norwich. In point of strict law, a debtor is bound to follow his creditor and find him, and pay him wherever he may be. The breach, therefore, was when the acceptor ought to have paid the bill, but failed.

COLERIDGE, J. Both the cases cited seem to assume that the contract is the cause of action.

In questions under the Statute of Limitations whether the cause of action accrued within six years, the time begins to run, not from the making, but from the breach of the contract. *Huth v. Long*³ shows that the breach of contract is the cause of action. Damages accrued to the plaintiff at Norwich, for at Norwich he was forced to pay the indorsee the amount of the bill in consequence of the default of the defendant.

Joyce, in support of the motion. It is incumbent on the plaintiff to show, not only that a material part of the cause of action, but that the whole cause of action arose at Norwich. The cause of action is the contract and breach together. *Roff v. Miller* is directly in point, and there the distinction was taken between an indorsement and acceptance, that the former is not complete without delivery, while the latter is. The plaintiff could not prove that every thing necessary to the validity of the contract on which he sued was done within the Norwich jurisdiction, for the acceptance was made in London. Secondly, the breach did not take place at Norwich. The defendant, it is clear, never was at Norwich. The contract is not a contract to pay at Norwich. The breach was in the district in which the defendant was when the bill became due and was dishonored.

Cur. adv. vult.

COLERIDGE, J., now said: This was a rule for a writ of prohibition to the judge of the County Court of Norfolk. The action was by

¹ 5 Exch. Rep. 43; s. c. 19 Law Jour. Rep. (N. S.) Exch. 151.

² 19 Law J. Rep. (N. S.) C. P. 278.

³ Ibid. Q. B. 375.

the drawer against the acceptor of a bill of exchange, drawn at Norwich, on the defendant in London, accepted in London, payable at Messrs. Roberts & Co. in London, and sent by the defendant, so accepted, to the plaintiff in Norwich; in which jurisdiction the plaintiff sues by leave of the judge. The question upon the 9 & 10 Vict. c. 95, § 60, is, whether the cause of action, that is, the whole cause of action, arose within the jurisdiction of that county court; and I am of opinion that it did not. Assuming that the cause of action was made up of the contract and the breach of it, it was argued against the rule, that this, being a general acceptance, bound the defendant to pay everywhere, and therefore at Norwich, where the plaintiff was when the bill became due; that the breach, therefore, was at Norwich, by the non-payment there at maturity (which obviously may be true without deciding this rule); and, further, that the acceptance itself was not perfect until the bill had been delivered to the plaintiff at Norwich, so that the contract also must be considered as having been made there. *Buckley v. Hann* was cited in support of this latter position, in which an *indorsement* on a bill of exchange written by the defendant in London, and sent by a messenger to the plaintiff at his residence in Middlesex, was held by the Court of Exchequer to be an indorsement made in Middlesex, the mere writing without the delivery being insufficient to constitute an indorsement. But it was admitted that when an acceptance had been written in Piccadilly in one jurisdiction and given to the drawer at Billingsgate in another, the cause of action was held complete in the former jurisdiction by the Court of Common Pleas. *Roff v. Miller*. This case was decided soon after the former, which appears to have been cited in the argument. But, in truth, the cases do not govern each other, and both appear to me well decided. One purpose of an indorsement is to pass the property in the bill, and that purpose is not effected until actual or constructive delivery. But the acceptor has no property in the bill either before or after acceptance; he must be supposed to receive the drawer's paper, and on it to write his promise without in any way altering the property in the bill. He may, indeed, before any communication to the drawer of the act done, revoke it, according to *Cox v. Troy* and modern authorities; but his promise, unless so revoked, is complete, and takes effect from the time when it was made. In saying this, I am aware of a sentence in the judgment of Bayley, J., in that case; but I think his language is to be construed with reference to the question then before the court, which was merely the revocability of an acceptance before communication of it to the holder. In *Smith v. M'Clure*,¹ where a declaration by the plaintiff, the drawer,

¹ 5 East, 476.

stated a delivery to the defendant and an acceptance by him, it was demurred to, because it did not go on to state a delivery back by the defendant to the drawer. Lord Ellenborough said the acceptance admitted by the demurrer must be taken to be perfect; and, if after such an acceptance the acceptor improperly detained the bill in his hands, the drawer might nevertheless sue him on it. It may be said, indeed, that this decision only proves that a perfect acceptance, whatever that imports, gives a right of action, because it implies whatever is necessary to make it perfect; but Lord Ellenborough's language imports at least that an acceptance might, in his opinion, be perfect without delivery; for he considers it may be perfect, though the bill be detained in the acceptor's hands. In the present case, however, the acceptance has been delivered, and the question is, where the contract, which that acceptance raises, is to be considered as made? Upon this point, Story, J., is very explicit in his Conflict of Laws, § 317: "Acceptances of bills are deemed contracts of acceptance in the place where they are made and where they are to be performed. So Paul Voet lays down the doctrine: *Quid si de literis Cambii incidat quæstio; quis locus erit spectendus? Is spectendus est locus, ad quem sunt destinatæ, et ibidem acceptatæ*. But suppose a negotiable acceptance or a negotiable note made payable generally, without any specification of place, what law is to govern in case of a negotiation of it by one holder to another in a foreign country, in regard to the acceptor or maker? Is it a contract by them to pay in any place where it is negotiated, so as to be deemed a contract of that particular place, and governed by its laws? The Supreme Court of Massachusetts have held that it creates a debt payable anywhere, by the very nature of the contract; and it is a promise to whomsoever shall be the holder of the bill or note. Assuming this to be true, still it does not follow that the law of the place of negotiation is to govern; for the transfer is not, as to the acceptor or maker, a new contract, but it is under and part of the original contract, and springs up from the law of the place where that contract was made. A contract to pay generally is governed by the law of the place where it is made, for the debt is payable there as well as in every other place. To bring a contract within the general rule of the *lex loci*, it is not necessary that it should be payable [*i.e.* to be performed] exclusively in the place of its origin. If payable [*i.e.* to be performed] everywhere, then it is governed by the law of the place where it is made, for the plain reason that it cannot be said to have the law of any other place in contemplation to govern its validity, its obligation, or its interpretation. All debts between the original parties are payable everywhere, unless some special provision to the contrary is made; and therefore

the rule is, that debts have no *situs*, but accompany the creditor everywhere. The holder, then, takes the contract of the acceptor or maker as it was originally made, and as it was in the place where it was made. It is there that the promise is made to him to pay everywhere." There can be no doubt upon this, that where a bill is sent from one country by the drawer to the drawee in another, who there accepts it and returns it to the drawer, both Voetius and Story would hold that the contract raised by the acceptance was made in the country of the drawee, that being the place *ad quem destinatur et ibidem acceptatur*. The contract accordingly, in this case, was made in London, and therefore the whole cause of action did not accrue in Norfolk. It follows, then, that the judge of the Norfolk County Court had not jurisdiction, and the rule for a prohibition must be absolute.

*Rule absolute.*¹

¹ Roff v. Miller, 19 L. J. C. P. 278, *accord*.

Freund v. Importers' Bank, 3 Hun, 689, *contra*.

See Smith v. McClure, 5 East, 476. — Ed.

CHAPTER III.

INDORSEMENT.

SECTION I.

An Indorsement should import an Order to pay according to the Tenor of the Bill or Note.

HAWKINS v. CARDY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1698.

[Reported in 1 Lord Raymond, 360.]

THE plaintiff brought an action upon the case upon a bill of exchange against the defendant, and declared upon the custom of merchants, which he showed to be thus: that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man or his order, and afterwards the person to whom the bill was made payable indorses the said bill, for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is indorsed payable; and then the plaintiff shows that the defendant Cardy, being a merchant, subscribed a bill of £46 19s. payable to Blackman, or his order; that Blackman indorsed £43 4s. of it payable to the plaintiff, &c. The defendant pleaded an insufficient plea. The plaintiff demurred, and the defendant joined in demurrer. And adjudged *per totam Curiam*, that the declaration is ill. For a man cannot apportion such personal contract, for he cannot make a man liable to two actions, where by the contract he is liable but to one. As if A. grants a rent charge of £20 per annum to B., B. grants £10 to C., C.¹ cannot compel the *terretenant* to attorn. So if lands are conveyed with warranty to A. and B., their heirs and assigns, if partition be made, the warranty is extinct. See Hob. 25, Roll. and Osborne's Case. But if in the principal case the plaintiff had acknowledged the receipt of the £3 15s., the declaration had been good. And though it was objected by *Mr. Northey*, for the plaintiff, that the plaintiff has made

¹ *Vide* 4 Bac. Abr. 368, 369; 2 Lev. 240.

payment of a part to be part of the custom, and therefore it was well enough by the custom, HOLT, C. J., answered, that this is not a particular local custom, but the common custom of merchants, of which the law takes notice; and therefore the court cannot take the custom to be so. And the whole court were of opinion that judgment ought to be entered for the defendant. But, upon the importunity of Mr. Northey, leave was given to the plaintiff to discontinue upon payment of costs.¹



EAST v. ESSINGTON.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1703.

[Reported in 7 Modern Reports, 86.]

AN action by the indorsee of a bill of exchange against the drawer, declaring upon the custom of merchants, and that A. to whom the bill was made, *indorsavit super billam præd. content. billæ præd.* to him the plaintiff *solvend.*

And here it was agreed by the court: that "indorsement" is a term known in law, and signifies a writing on the back of a paper or parchment containing another writing.

To this declaration two exceptions were taken in arrest of judgment: First, that the words of the indorsement were not significative enough to pass the property of the bill to the plaintiff, according to the custom of merchants. The second exception was, that it appears there were three bills for the same sum, and that whereon the action is brought was the first, and says, "my second or third not paid, pay this my first."

But *per Curiam*. However that matter would have been on demurrer, it will be well after verdict; for if the second or third were paid, there had been no promise at all, for the promise is conditional to pay this, if the second or third be not paid; therefore if the second or third were paid, the jury could not find for the plaintiff.²

¹ Anon., 3 Salk. 70; Oridge v. Sherborne, 11 M. & W. 378, *per* Parke, B.; Bibb v. Skinner, 2 Bibb, 57; Elledge v. Straughn, 2 B. Mon. 81; Galliopolis Bank v. Trimble, 6 B. Mon. 599; Douglass v. Wilkeson, 6 Wend. 637; Martin v. Hayes, Busbee, 423; Hughes v. Kiddell, 2 Bay, 324; Frank v. Kaigler, 36 Tex. 305, *accord.*

Conf. Flint v. Flint, 6 All. 34. — *Ed.*

² See Starke v. Cheeseman, Carth. 509, and Wegersloff v. Keene, 1 Stra. 223, where it is held that this allegation is unnecessary after judgment by default, or on demurrer to the replication. See also Hotham v. East India Company, 1 Term Rep. 640; Collins v. Gibbs, 2 Burr. 899.

And as to the first exception they held that that would be likewise good after verdict; for without finding an indorsement, they could not find for the plaintiff.¹ And it is not true to say, that at this rate, and for this reason, it may be said, if there were no manner of indorsement, that defect would be cured by verdict; for here there is a kind of an indorsement set forth, and the jury could not find for the plaintiff without finding this to be a good indorsement, and such as amounts to an agreement to have the money paid to the plaintiff. A bill of exchange may be accepted by parol, but not transferred otherwise than by writing upon the back of it; and that transfers the property, by the custom of merchants. And they put the case of debt for rent, by the grantee of reversion, without showing attornment, and helped by verdict; and so in case of bargain and sale, pleaded without enrolment, good after verdict.

HOLT, C. J. If a man write on the back of a bill of exchange, "This is to be paid to J. S.," or, "The contents of this bill to be paid to J. S.," and set his hand to it, it will be a good indorsement.

Quære pro me. Why not a declaration of trust? But if there be no indorsement at all set forth, the verdict cannot help.

*And judgment was given for the plaintiff.*²

¹ See *Pinkney v. Hall*, 1 Ld. Ray. 175.

² A payee or subsequent party who writes mere words of assignment upon a bill or note, *e. g.*, "I hereby assign," &c., or "I have sold this note," &c., cannot be charged as an indorser. *Lyons v. Divelbis*, 22 Pa. 185; *Kilpatrick v. Heaton*, 3 Brev. 92; *Crosby v. Roub*, 16 Wis. 616 (*semble*).

The decisions to the contrary in *Henderson v. Ackelmire*, 59 Ind. 540; *Sands v. Wood*, 1 Iowa, 263; *Sears v. Lantz*, 47 Iowa, 658 (but see *Franklin v. Twogood*, 18 Iowa, 515; 25 Iowa, 520, s. c.); *Adams v. Blethen*, 66 Me. 19, are clearly erroneous. See also *Marks v. Herman*, 24 La. An. 335.

Furthermore, an assignment, not being an indorsement, cannot operate as a transfer, according to the law-merchant, but will give to one claiming under it as against parties antecedent to the assignor merely the rights of an assignee of an ordinary chose in action. *Anita v. Yeomans* (Michigan, 1878), 7 C. L. J. 197. But see *contra*, *Crosby v. Roub*, 16 Wis. 616; *Bangs v. Flint*, 25 Wis. 544.

Deshler v. Guy, 5 Ala. 186, and *Rowe v. Hawkins*, 15 Ind. 445, decide nothing more than that, in jurisdictions in which choses in action are assignable, one claiming under such an assignment may sue prior parties in his own name. — ED.

SMALLWOOD v. VERNON.

MICHAELMAS TERM, 1721.

[Reported in 1 Strange, 478.]

CASE by original in B. R., and declares against the defendant as indorser of a promissory note; and, after setting out the note and indorsement, he goes on, that, *virtute inde*, the defendant became chargeable with the payment of the money *secundum tenorem* of the indorsement. The defendant, upon *oyer* of the original, pleads in abatement that the charge against him ought to be according to the tenor of the note, and not of the indorsement. And Strange, *pro def.*, insisted that it might be that the indorsement appointed the money to be paid at a different time from what is mentioned in the note; which are terms that the indorser cannot lay upon the party who made the note. Suppose the note be payable May 1, surely the party to whom it is given cannot say, I appoint the contents of this note to be paid to J. S. upon April 1. Or if he should, yet the other will not be bound to pay it till May. And if he is charged according to the terms of the indorsement, his only remedy must be to traverse the being charged otherwise than according to the tenor of the note. And as to the objection, that in counts upon promissory notes there is no occasion to lay any express assumpsit, and therefore the whole may be rejected, he answered, that where the pleader does not rely upon the first part of the case he makes, but goes on further, and alleges other matter, he by that gives the other side an opportunity of traversing the last matter; as Lutw. 108.

Sed per Curiam. There is no occasion to pray in aid of that objection here, where the action is against the indorser. It is true he cannot lay a charge upon the giver of the note in a manner different from the terms of it; but he may charge himself if he pleases, for every indorsement is the same as making a new note; and, if the note be payable May 1, and the indorsement appoints it to be April 1, as to the indorser, this is a promissory note payable April 1. If this was an action against the giver of the note, there might be more in the objection.

*Respondes ouster agard.*¹

¹ See Haney v. Sangston, 3 Dana, 246.

The case of Russel v. Langstaffe, which properly belongs in this section, will be found in the Appendix to this volume, p. 884. — ED.

DAY AND ANOTHER v. LYON.

IN THE COURT OF APPEALS, MARYLAND, JUNE, 1823.

[Reported in 6 Harris & Johnson, 140.]

APPEAL from Baltimore County Court. *Assumpsit* by the plaintiffs (now appellants) on a promissory note drawn by Latimer and Lyon in favor of the defendant, and by him indorsed in blank.¹ On the defendant's prayer, which was a general one, the County Court (Hanson, A. J.) directed the jury that the plaintiffs were not entitled to recover. The plaintiffs excepted and appealed, the verdict and judgment being against them. The cause was submitted without argument.

BUCHANAN, EARLE, MARTIN, and DORSEY, JJ., on the bench.

Wirt (Attorney-General of the United States), for the appellants.

Heath, for the appellee.

The opinion of the court was delivered by

DORSEY, J. We concur in the opinion given by the court below. The plaintiff did not deduce a regular title to the note. True it is that the defendant, by indorsing the note in blank, conferred an authority on the plaintiffs to fill up the indorsement, but he omitted to do it; and it was decided by this court, in the case of *Ringgold v. Tyson*, at December term, 1810, and in *Hudson v. Goodwin*, 5 Harr. & Johns. 115, that an indorsee could not maintain an action on a note payable to order, unless the indorsement was filled up at the time it was offered in evidence. As this point is decisive against the plaintiffs, it is unnecessary to inquire whether the facts stated in the bill of exceptions did, in point of law, amount to due notice of the dishonor of the note.

*Judgment affirmed.*²

¹ Only so much of the case is given as relates to the validity of the indorsement. — ED.

² *Brewster v. Dana*, 1 Root, 266; *Ringgold v. Tyson*, 3 Har. & J. 172; *Hudson v. Goodwin*, 5 Har. & J. 115; *Peaslee v. Robbins*, 3 Met. 164; *Wiggins v. Rector*, 1 Mo. 478; *Menard v. Wilkinson*, 3 Mo. 92; *Riker v. Corley*, 2 Penningt. 191, *accord*.

Riggs v. Andrews, 8 Ala. 628; *Sawyer v. Patterson*, 11 Ala. 523; *Poorman v. Mills*, 35 Cal. 118; *Gillham v. State Bank*, 3 Ill. 245; *Bowers v. Trevor*, 5 Blackf. 24; *Clark v. Walker*, 6 Blackf. 82; *Ferry v. Jones*, 10 Ind. 226; *Moore v. Pendleton*, 16 Ind. 481; *Rich v. Starbuck*, 51 Ind. 87; *Sprigg v. Cuny*, 7 Mart. n. s. 253; *Griffon v. Jacobs*, 2 La. 192; *M'Donald v. Bailey*, 14 Me. 101; *Chewning v. Gatewood*, 6 Miss. 552; *Greenough v. Smead*, 3 Oh. St. 415, *contra*.

Conf. Whitten v. Hayden, 9 All. 408; *West v. Meserve*, 17 N. H. 432; *Crozer v. Chambers*, Spencer, 256, 259; *Gardner v. Williamson*, 4 Ired. 266.

The blank indorsement may be filled up at the trial. *Lucas v. Marsh*, Barnes,

HENRY S. BELCHER v. NORMAN A. SMITH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1851.

[Reported in 7 Cushing, 482.]

THIS was an action of *assumpsit* on a promissory note, bearing date of Jan. 16, 1850, and payable to the defendant or his order, on demand.

At the trial in the Court of Common Pleas, before Hoar, J., the following facts appeared: The defendant on the 3d of February, 1850, transferred this note to Field & Leland, in payment of a debt, and wrote his name on the back of the note, with these words over it: "I hereby guarantee the within note." Field & Leland subsequently transferred the note to the plaintiff, and indorsed upon it, over their signature, these words: "For value received pay to Henry S. Belcher at his own risk." The defendant objected that the plaintiff could not maintain an action in his own name, on the defendant's indorsement; that it showed a contract of guarantee with Field & Leland, and was not negotiable. But the court ruled that, although the contract of guarantee was not negotiable, the effect of the transfer of the note from the defendant to Field & Leland with the indorsement upon it was such as would have authorized Field & Leland, and would authorize the plaintiff to write over the indorsement the words "pay to Field & Leland or their order;" and the plaintiff was permitted by the court, against the objection of the defendant, to write those words.

The plaintiff having obtained a verdict, the defendant excepted to the above ruling.

C. P. Huntington, for the defendant.

E. Clark, for the plaintiff.

DEWEY, J. The question raised in the present case, of the right of the plaintiff to maintain an action as indorsee of the promissory note sued upon, was fully considered by us and settled in the recent case of *Tuttle v. Bartholomew*.¹ Upon a review of the question, and comparison of the conflicting decisions and grounds upon which they were placed, the court were of opinion that where the name of the payee of the note was indorsed on the back of the note in no other form than as a signature to a guarantee fully written out and expressed, leaving

453; *Pickett v. Stewart*, 12 Ala. 202; *Edwards v. Scull*, 11 Ark. 325; *Croskey v. Skinner*, 44 Ill. 321; *Cope v. Daniel*, 9 Dana, 415; *Condon v. Pearce*, 43 Md. 83; *Fairfield v. Adams*, 16 Pick. 381; *Norris v. Badger*, 6 Cow. 449; *Johnson v. Hooker*, 2 Jones (N. Ca.), 29; *Rees v. Conococheague Bank*, 5 Rand. 326. — ED.

¹ 12 Met. 452.

nothing for implication, this was not such an indorsement as authorized a subsequent holder of the note to sue upon it as indorsee. It is true there was the further objection in that case, that the guarantee was signed not only by the payee of the note, but also by another person, and in the form of a joint guarantee. But, irrespective of that, the court were of opinion that the plaintiff could not enforce the payment of the note by a suit in his own name, as indorsee.

*New trial ordered.*¹

1. That a payee or subsequent party who writes a guarantee upon a bill or note is not liable as indorser is now well settled. *Erskine v. M'Lendon*, 1 Stew. 31; *Davis v. Campbell*, 3 Stew. 319; *Bissell v. Gowdy*, 31 Conn. 47 (*semble*); *Springer v. Hutchinson*, 19 Me. 359; *Taylor v. Binney*, 7 Mass. 479; *Tinker v. McCauley*, 3 Mich. 188, 193 (*semble*); *Lamourieux v. Hewit*, 5 Wend. 307; *Miller v. Gaston*, 2 Hill, 188; *Brown v. Curtiss*, 2 Comst. 225; *Brewster v. Silence*, 4 Seld. 207, 214; *Small v. Sloan*, 1 Bosw. 352; *Snevily v. Ekel*, 1 Watts & S. 203; *Turley v. Hodge*, 3 Humph. 73; *Smith v. Dickinson*, 6 Humph. 261; *Foster v. Barney*, 3 Vt. 60; *Crosby v. Roub*, 16 Wis. 616 (*semble*).

See *contra*, *Vanzant v. Arnold*, 31 Ga. 210; *Upham v. Prince*, 12 Mass. 14 (*overruled*); *Leggett v. Raymond*, 6 Hill, 639 (*overruled*); *Bell v. Johnson*, 4 Yerg. 194 (*overruled*); *Partridge v. Davis*, 20 Vt. 499.

Nor is a guarantee in any sense negotiable, whether made by a payee or subsequent party to a bill or note, *M'Doal v. Yeomans*, 8 Watts, 361; or written upon the instrument by one not a party to it, *Irish v. Cutter*, 31 Me. 536; *True v. Fuller*, 21 Pick. 140; *Ten Eyck v. Brown*, 4 Chndl. 151; 3 Pinney, 452, s. c.; *Beckley v. Ecker*, 3 Barr, 292; *Northumberland Bank v. Eyer*, 58 Pa. 97 (*semble*), (see *contra*, *Webster v. Cobb*, 17 Ill. 459); or contained in a separate instrument, *Watson v. McLaren*, 19 Wend. 557; 26 Wend. 425, s. c.

Accordingly, although in jurisdictions in which by statute choses in action have been made assignable, a guarantor may be charged in an action brought by a remote holder in his own name, *Killian v. Ashley*, 24 Ark. 511; *Cole v. Merchants' Bank*, 60 Ind. 350; *First Bank v. Carpenter*, 41 Iowa, 518; *Cooper v. Dedrick*, 22 Barb. 516, the guarantor may set up any defences which would hold in an action between the immediate parties to the guaranty, *Levi v. Mendell*, 1 Duv. 77; *Gallagher v. White*, 31 Barb. 92. See *contra*, *Webster v. Cobb*, 17 Ill. 459; and *conf.* *Opdyke v. Pacific R. R.* 3 Dill. 55.

Consistently with the doctrine stated above, a guarantee, not being an indorsement, cannot operate as a transfer according to the law-merchant, but will give to one claiming under it as against parties antecedent to the guarantor merely the rights of an assignee of an ordinary chose in action. *Canfield v. Vaughan*, 8 Mart. 682; *Tuttle v. Bartholomew*, 12 Met. 452 (*overruling* *Blakely v. Grant*, 6 Mass. 386).

The contrary doctrine asserted in *Bissell v. Gowdy*, 31 Conn. 47 (*semble*); *Myrick v. Hasey*, 27 Me. 9; *Heard v. Dubuque Bank*, 8 Nebr. 10; *Barrett v. May*, 2 Bail. 1; *Mosely v. Graydon*, 4 Strob. 7; *Benton v. Fletcher*, 31 Vt. 418 (*semble*); *Crosby v. Roub*, 16 Wis. 616 (*semble*), is indefensible.

Herring v. Woodhull, 29 Ill. 92; *Childs v. Davidson*, 38 Ill. 437; *Kauzman v. Weirick*, 26 Oh. St. 330; *May v. Hancock*, 1 Bail. 299, decide nothing more than that, in jurisdictions in which choses in action are assignable, one claiming under such a guarantee may sue prior parties in his own name. — ED.

SECTION II.

An Indorsement must be in Writing upon the Bill or Note.

MOXON AND OTHERS v. PULLING AND OTHERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, JULY 21, 1814.

[Reported in 4 Campbell, 50.]

THIS was an action against the defendants as indorsers of a bill of exchange for £500, drawn by P. Macdougall, payable to his own order, accepted by Hallet & Co.

The plaintiffs were holders of another bill for the same amount, accepted by the defendants. On the 19th of July, 1813, being called upon to pay it, they said they had lent that bill to J. D. May, who had promised to provide them with funds to meet it, and they should call upon him to comply with his engagement. The plaintiffs' agent then saw May, who proposed that they should take the acceptance of Hallet & Co. in payment. This was agreed to, on condition that the defendants indorsed it; and May promised to procure their indorsement. The proposed arrangement was then mentioned by the agent to the defendants, who agreed to it; and one of them said he would go and indorse the bill. On 23d July, the plaintiffs received from May the bill in question, purporting to be indorsed by the defendants; and, the next day, the former bill was delivered up to him. The indorsement was not the handwriting of the defendants, but turned out to be a forgery.

It was, nevertheless, contended that they were liable as indorsers, on the ground that the indorsement, under these circumstances, must be taken to have been made with their authority.

LORD ELLENBOROUGH. You cannot establish any agency to indorse the bill. When the promise was given, the bill does not appear to have existed; and all was *in fieri*. The defendants might have repented, and refused to indorse. They may be liable for a breach of promise; but they cannot be sued as indorsers of the bill.

*Plaintiff nonsuited.*¹

¹ *Wilmington Bank v. Houston*, 1 Harring. 225, accord. — ED.

GEORGE DILLEY YOUNG v. REUBEN THEODORE GLOVER
AND EDGAR AUGUSTUS GLOVER.

IN THE QUEEN'S BENCH, APRIL 28, 1857.

[Reported in 3 *Jurist, New Series*, 637.]

DECLARATION stated that the plaintiff, by his bill of exchange, then overdue, directed to William Booth, required William Booth to pay to the plaintiff's order £54 9s. three months after date, and the plaintiff indorsed the same to the defendants, who indorsed the same to the plaintiff. Presentment and dishonor. First plea: that the defendants did not indorse the said bill of exchange in manner and form. Issue thereon. On the trial before Wightman, J., at the sittings in London during this term, it appeared that the plaintiff, having a claim against Booth, proposed to give his acceptance, indorsed to the defendants; thereupon the plaintiff drew the bill, and Booth accepted it; the bill was then taken to the defendants, who wrote across the face of it, under the words "Accepted, William Booth," "R. & E. Glover." It was objected that the name of the defendants being written on the face of the bill, the bill was not indorsed according to the custom of merchants. A verdict was entered for the plaintiff, leave being reserved to move to enter a nonsuit.

April 27.¹—*Tindal Atkinson* moved for a rule to show cause accordingly. [LORD CAMPBELL, C. J. Generally speaking, it is wholly immaterial on what part of the paper the name of a party to the instrument is written. In the case of an attesting witness to a will, it has been held that it is immaterial where the name was signed. It is allowed that if the name had been written on the back of the bill the defendants would have been liable as indorsers; and the only objection is, that the name is written on the face of the bill. But they could not be the acceptors of the bill, because they were not the drawees, and it is only in the capacity of indorsers that they could be liable; in the nature of things they are the indorsers.] Bills of exchange must be treated as regulated by the custom of merchants, and mischief would arise from allowing a departure from the order in which the parties to a bill sign their names. Where the back of the bill is filled with the names of indorsers, an additional indorser is provided for by an "allonge." The signature of the defendants violates the word "indorsement," and they would not be able

¹ Before Lord Campbell, C. J., Wightman, Erle, and Crompton, JJ.

to sue a subsequent indorsee. [LORD CAMPBELL, C. J. Suppose the drawee wrote "accepted" on the back of the bill, would it not be a valid acceptance? It cannot be maintained that a signature on the face of the bill by the payee is void. Such a signature must operate as an indorsement.] *Cur. adv. vult.*

April 28. — LORD CAMPBELL, C. J., said this was an action by the indorsee of a bill of exchange against the indorsers. All was regular, except that the indorsement was written on the face of the instrument instead of the back. But the indorsement was clearly proved to be written by the defendants as indorsers, and we are of opinion they hereby make themselves liable as indorsers. It is quite immaterial whether it was written on the back of the instrument or on the face, and therefore there will be no rule. *Rule refused.*¹

FRENCH *v.* TURNER.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1860.

[Reported in 15 Indiana Reports, 59.]

APPEAL from the Ohio Circuit Court.

WORDEN, J. Suit by French against Turner. The complaint contained three paragraphs or counts, to each of which a demurrer was sustained, and final judgment was rendered for the defendant.

French, having excepted to the ruling, brings the case here for revision.

The first count² states, in substance, that on Nov. 6, 1852, one John Bodle executed and delivered to Abel C. Pepper a mortgage on certain land, therein described, to secure the payment of \$1,100, evidenced by ten promissory notes of that date, each for \$110; one payable in a year from date, and one maturing each year thereafter until they all become due, with interest payable annually. That in September, 1854, Pepper assigned and transferred the mortgage and notes, by indorsement on the mortgage, to the defendant, Turner. That Turner, in January, 1858, for value received, transferred the mortgage and notes to the plaintiff, by indorsement in writing on the mortgage. The mortgage and notes, together with the assignment,

¹ *Ex parte* Yates, 27 L. J. Bank, 9; *Armfield v. Allport*, 27 L. J. Ex. 42 (*semble*); *Herring v. Woodhull*, 29 Ill. 92; *Gibson v. Powell*, 7 Miss. 60; *Haines v. Dubois*, 30 N. J. 259, *accord*.

Conf. *Rex v. Bigg*, 1 Stra. 18; 3 P. Wms. 419, s. c. — ED.

² Only so much of the case is given as relates to this count. — ED.

are set out. The assignment from Turner to the plaintiff on the mortgage is as follows, viz. : —

“For value received, I hereby assign the within mortgage and notes, therein described, to John J. French.

“JAN. 2, 1858.

(Signed)

MOSES TURNER.”

It is averred that the note which became due on Nov. 6, 1858, and the interest on the others not due, remain due and unpaid. That, for the notes which matured before Nov. 6, 1858, he foreclosed the mortgage, and the mortgaged premises were sold for \$600, being fifty dollars less than the judgment, interest and cost. That Bodle, at the time of the execution of the notes and mortgage, had no property subject to execution except the mortgaged premises, nor did he have at the time of the maturity of any of the notes. That he is still wholly and notoriously insolvent, having no property subject to execution, and that an action against him would be unavailing: wherefore, &c.

The first count is evidently based upon the supposition that the defendant is liable as an indorser of the notes. This, however, is not the case. In order to render him thus liable, the indorsement of the notes must have been made “thereon” (1 R. S. 1852, p. 378), or perhaps “on another paper annexed thereto (called in France *allonge*), which is sometimes necessary when there are many successive indorsements to be made.” Story on Bills, § 204.

The indorsement in question made upon the mortgage refers to the notes as being therein described, and is not upon the notes or upon any paper attached to them. Such an assignment could not operate to transfer the legal title to the notes. It would convey an equitable title, authorizing the assignee under our code to sue thereon in his own name, but it does not place the assignor in the condition of a legal indorser. By such an assignment, the assignor does not warrant the solvency of the maker of the notes. It is no more effectual for that purpose than a parol assignment would be, — an assignment made by the delivery of the notes. The case is analogous to the transfer of a bill payable to bearer by delivery. “If it is payable to the bearer, then it may be transferred by mere delivery. But although it may be thus transferred by mere delivery, there is nothing in the law which prevents the payee of a bill, payable to himself or bearer, from transferring it if he chooses by indorsement. In such a case, he will incur the ordinary liability of an indorser, from which, in the case of a mere transfer by delivery, he is ordinarily exempt. On the transfer of a bill, payable to the bearer, by delivery only, without indorsement, the person making it ceases to be deemed a party to the

bill; although he may in some cases incur a limited responsibility to the person to whom he immediately transfers it, founded upon particular circumstances, as, for example, upon his express or implied guarantee of its genuineness, and his title thereto." Story on Bills, § 200.

The defendant not being liable upon the notes as indorser thereof, it follows that the first count is bad, and the demurrer thereto was properly sustained.

Per Curiam. The judgment is affirmed, with costs.

James S. Jelley and *William S. Holman*, for appellants.

A. C. Downey and *H. A. Downey*, for appellees.¹

¹ *Hopkirk v. Page*, 2 Brock. 20; *Hull v. Planters' Bank*, 6 Ala. 761; *Gookin v. Richardson*, 11 Ala. 889; *Borum v. King*, 37 Ala. 606; *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 Ill. 212; *Badgley v. Votrain*, 68 Ill. 25; *Keller v. Williams*, 49 Ind. 504; *Franklin v. Twogood*, 18 Iowa, 515; *Instone v. Williamson*, 2 Bibb, 83 (*semble*), *accord*.

Jones v. Elliott, 4 La. An. 303; *Mosely v. Graydon*, 4 Strob. 7, *contra*.

Conf. Crutchfield v. Easton, 18 Ala. 337; *Folger v. Chase*, 18 Pick. 63; *Crosby v. Roub*, 16 Wis. 616; *Chipman v. Tucker*, 38 Wis. 43, 49. — ED.

SECTION III.

No One but the Payee or a Subsequent Holder can be an Indorser.

BISHOP v. HAYWARD.

IN THE KING'S BENCH, NOV. 21, 1791.

[*Reported in 4 Term Reports, 470.*]

THE plaintiff declared on a promissory note, made by one Collins, payable to the plaintiff, or order, and afterwards indorsed by him to the defendant, who afterwards reindorsed it to the plaintiff again. After verdict for the plaintiff on the general issue, a motion was made by

Bower, in arrest of judgment, upon the ground that nothing appeared to be due to the plaintiff on his own showing; for the defendant would be entitled to recover back again the identical sum from the plaintiff for which he had now obtained a verdict against the defendant; and, therefore, as this would introduce a circuity of action, which the law does not permit, the declaration was bad upon the face of it.

Plumer, Lane, and *Dauncey* showed cause; contending that there was no instance of a judgment being arrested, because, *prima facie*, there might be a circuity of action. But the plaintiff is entitled to maintain his verdict, if nothing appear which is necessarily inconsistent with his demand; and, therefore, if any case can be stated where upon this record the plaintiff, according to justice and law, would not be bound to refund the money again, the court will presume, after verdict, that such a case was made out in evidence. Now, suppose it had happened that the plaintiff had refused to receive this note from Collins as a satisfaction for his debt, unless Hayward put his name upon it, to which Hayward had agreed, and had delivered it again to the plaintiff, his name as payee having been first indorsed upon it by way of form: in this case, no doubt Bishop would be entitled to maintain his action as subsequent indorsee against Hayward; and yet Hayward could not have recovered the money again of him as prior indorser, on account of the agreement between them. That was this very case. The objection of circuity only holds where there is necessarily an equality of action. *Moor*, 23. But it does not necessarily follow that the plaintiff's recovering here will introduce a circuity of action. There

is nothing contrary to the law of merchants in a person's being the indorsee of a note which he had before indorsed. The indorsement is only *prima facie* evidence of consideration. It may be rebutted; and it might have been proved that the first indorsement to Hayward was without consideration, and the second for a good one. And this must have been proved; otherwise, the plaintiff could not have recovered a verdict. And, if the defendant had had a counter-demand upon the plaintiff, he should have pleaded a set-off; but it is not usual to state in the declaration whether the indorsement were with or without consideration. This is a motion in arrest of judgment; and, after verdict, it must be taken that every thing was proved necessary to enable the plaintiff to recover. 2 Burr. 899. The effect of this verdict is not only that the plaintiff had a right, under the circumstances, to recover against the defendant, but also that the defendant could not recover the same sum back again from him upon the note.

LORD KENYON, C. J. It is an invariable rule that every plaintiff must, on his own stating of the case, show sufficient to entitle him to recover judgment against the defendant; and it is a rule equally clear that every instrument ought to be declared on according to its legal import. I do not say but that there may be circumstances which, if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note; but we are now called upon to form a judgment on the title which he has disclosed; and, on the face of the declaration, he has stated the note as a legal existing note, and the indorsements as legal existing indorsements. We are therefore bound to consider them to be so. Then the case stands thus: that he, the plaintiff, being the original indorser of the note, calls on the defendant, who appears on the record to be a subsequent indorsee. And nothing can be clearer in law than that an indorsee may resort to either of the preceding indorsers for payment: whereas the present action is an attempt to reverse this. I admit that a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note, — *e. g.*, that his own name was originally used for form only, and that it was understood by all the parties to the instrument that the note, though nominally made payable to the plaintiff, was substantially to be paid to the defendant; but, if such were the case, the note should have been declared on according to its legal import, as was held in *Minet v. Gibson*.¹ A name may be omitted in the declaration, if the legal operation of the instrument requires it. But, in this case, the plaintiff has stated facts subversive of his title.

BULLER, J. The consequence of supporting this judgment would

¹ 3 T. R. 481; H. Bl. Rep. 569.

be, that the plaintiff, without having any real demand on the defendant, may recover against him by the judgment of the court, without allowing to the defendant a possibility of defending himself. For, on the trial, it was only necessary for him to prove that the note in question was given, as stated in the declaration, payable to the plaintiff; that it was indorsed by him to the defendant, and by him reindorsed to the plaintiff. The defendant cannot deny these facts; on proving which, the judge at *nisi prius* was bound to say that he was entitled to recover, because he had proved the whole of his declaration. Then, having obtained a verdict, he comes to this court, and relies on that verdict as conclusive that he has a cause of action, on the ground that this court must presume after verdict that, if the case supposed by the plaintiff had not been proved, he could not have recovered at *nisi prius*. But, on a motion in arrest of judgment, we are bound to look at the title which the plaintiff himself has stated, beyond which no presumption can be admitted. The cases of presumption alluded to are where the plaintiff has stated a case defective in form, not where he has shown a title defective in itself.¹ The case commonly put of a presumption after verdict is where a feoffment is pleaded without livery; there a livery is implied as making a part of the feoffment. But if the title be defective on the face of it, the court cannot sustain the judgment. There is no foundation for the argument relative to the set-off; for the statutes only enable a defendant to set off one debt against another.

Per Curiam.

Judgment arrested.

JOHN PENNY, SURVIVING PARTNER OF ROBERT BROOKES,
v. JOHN ROSE INNES.

IN THE EXCHEQUER, MICHAELMAS TERM, 1834.

[Reported in 1 Crompton, Meeson, & Roscoe, 439.]

ASSUMPSIT on a bill of exchange. The first count stated that one William Wilson made his bill of exchange, and thereby requested Henry Wilson & Co., twelve months after date, to pay to his (W. W.'s) order the sum of £200. It then stated an indorsement by W. W. to the defendant, and an indorsement by the defendant to the plaintiff and Robert Brookes. The second count stated the making of the bill as in the first count, and an indorsement by the defendant to

the plaintiff Brookes (omitting the statement of the indorsement by W. W.). The third count stated that the defendant drew the bill upon the same drawees, payable to his own order, and that he indorsed it to the plaintiff and Brookes. The fourth count stated that the defendant drew the bill upon the same drawers, payable to the order of W. W., and that W. W. indorsed it to the plaintiff and Brookes. The fifth count stated that W. W. drew the bill upon the same drawees, payable to his own order, and indorsed it to the plaintiff and Brookes, who delivered the bill to the defendant, who then and there indorsed and delivered the same to the plaintiff and Brookes. The declaration also contained a count for goods sold and delivered, and the usual money counts. Plea: the general issue. On the trial before Parke, B., at the London sittings after last Trinity term, the bill upon which the action was brought appeared to be in the following form:—

“£200 0s. 0d.

9th SEPT., 1829.

“Twelve months after date, pay to me, or my order, the sum of two hundred pounds, for value received.

“WILLIAM WILSON.

“MESSRS. HENRY WILSON & Co.,

“Pedlar’s Acre, Lambeth.”

(Indorsed)

“Pay Messrs. Brookes & Penny, or order.

“WILLIAM WILSON.

“JOHN ROSE INNES.

“BROOKES & PENNY.”

It appeared in evidence that the defendant had indorsed his name upon the bill after the special indorsement by William Wilson, the payee, to the plaintiff and Brookes, and before the indorsement by the latter, and it was objected that this indorsement gave no title to the plaintiff and Brookes to sue the defendant on the bill; but the learned Baron thought that the indorsement amounted to a fresh drawing, and the plaintiff had a verdict. No question arose with regard to the consideration for the defendant’s indorsement.

Platt now moved for a rule to show cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, or a new trial had. The question is, whether the defendant, by putting his name on the back of the bill immediately after the special indorsement, and before the indorsement by the special indorsees, rendered himself liable as a new drawer; and, if so, whether the bill did not require a fresh stamp. The defendant conveyed no interest in the bill by his indorsement. Had it been indorsed by the plaintiff and Brookes to

the defendant, and by him indorsed again to the plaintiff and Brookes, they could not have sued the defendant as indorsee, because he in his turn might have sued them in the same character. In what capacity is the defendant liable upon the bill? He is a mere stranger to it, and has neither property nor the power of transferring the property in it. He puts his name upon it. That act confers no title upon any one, and imposes no liability upon the defendant.

LORD LYNDHURST, C. B. The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to Brookes & Penny to strike out their own indorsement, and then the bill would have stood as a bill indorsed by the defendant in blank. This would not have prejudiced any other party. The bill was their property; and the indorsement, whether general or special, might be struck out.

PARKE, B. Every indorser of a bill is a new drawer, and it is part of the inherent property of the original instrument that an indorsement operates as against the indorser in the nature of a new drawing of the bill by him. Still it remains the same instrument as before, and does not require a fresh stamp, for it is not a fresh instrument. It is urged that the defendant when he indorsed the bill had no property in it; but that is not necessary in order to render him liable to be sued upon the bill. Suppose that a man steals a bill and indorses it for value, might it not in pleading be stated that he drew the bill? The indorsement by the defendant was equivalent to the drawing of a new bill, and was intended to transfer that new bill to the plaintiff and Brookes. It has been argued that the case may be treated as if the defendant was the indorsee of the plaintiff and Brookes, and as if he had again delivered the bill to them; and it is said that in such a case, to avoid circuity of action, the plaintiff ought not to be suffered to recover. But the fact was not so. The defendant never was the indorsee of the plaintiff and Brookes, nor was it ever intended to convey the property in the bill to him.

ALDERSON, B. The indorsement only operates as against the party making it, and then as a fresh drawing. It has no operation with regard to the other parties to the bill.

GURNEY, B. I am of the same opinion.

*Rule refused.*¹

¹ Conf. *Allen v. Walker*, 2 M. & W. 317; *Burmester v. Hogarth*, 11 M. & W. 97; *Lawrence v. Oakey*, 14 La. 386. — Ed.

WILLIAM GWINNELL v. EDWARD HERBERT.

IN THE KING'S BENCH, JUNE 11, 1836.

[Reported in 5 *Adolphus & Ellis*, 436.]

ASSUMPSIT. The declaration stated that the defendant on, &c., made his promissory note, and thereby promised to pay the plaintiff £7 12s. 6d., one month after date, which period had elapsed. There was also a count on an account stated. Pleas: that defendant did not make the said note in manner, &c., concluding to the country; and, as to the account stated, the general issue. On the trial before the under-sheriff of Gloucestershire, Feb. 19, 1836, the note was put in. It was payable to William Gwinnell, or order, signed Herbert Herbert, and indorsed, in the defendant's handwriting, E. Herbert. Under that name was written William Gwinnell. The note had an eighteen-penny stamp. The under-sheriff objected that Edward Herbert, not being named on the face of the note, but on the back as an indorser, he was not maker, as stated in the declaration. For the plaintiff, Penny v. Innes was cited. No notice of dishonor was proved to have been given to Edward Herbert. The under-sheriff stated to the jury that, on the authority of the case cited, Edward Herbert must be considered as a new maker; and that, as against a maker, notice of dishonor was unnecessary. The plaintiff had a verdict; but the under-sheriff certified (under Stat. 3 & 4 Will. IV. c. 42, § 18) to stay judgment till a new trial could be moved for. *Busby*, in the ensuing term, moved for a new trial, on the grounds that, assuming an indorser to stand in the situation of a new maker, he was not to be described in pleading as the maker, and that he was not in effect a maker. A rule *nisi* was granted.

R. V. Richards now showed cause. The under-sheriff's ruling, on the authority of Penny v. Innes, was right. In that case, a bill drawn by Wilson, payable to his own order, and by him especially indorsed to Brookes and Penny, was next indorsed by Innes, and then by Brookes and Penny. Lord Lyndhurst there said: "The indorsement of this bill by the defendant gave it all the effect of a new instrument as against him, though it did not in fact create a new instrument. It was competent to Brookes and Penny to strike out their own indorsement; and then the bill would have stood as a bill indorsed by the defendant in blank. *Plimley v. Westley*¹ may be mentioned as a contradictory authority; but there the note was not payable to order. Here, the instrument being negotiable, a new

¹ 2 New Ca. 249.

stamp was not necessary to render the indorser liable as a new maker. The note was a new instrument in some respects, but not in all. If a party is possessed of a note or bill without proper title, and transfers it, he is liable; because the law will not allow him to say: "I have no title, and therefore my indorsee can have none against me." [PATTESON, J. Every indorser of a bill may be a new drawer; but the maker of a promissory note is an acceptor.] Unless the defendant here can be sued as maker, there is no remedy: he ought not to be discharged merely because a person who ought to have indorsed has omitted doing so.

Busby, contra. By the custom of merchants, the indorser of a note stands in the place of the drawer of a bill, as is said in *Heylyn v. Adamson*; but he is never declared against as a drawer in fact. As to the maker of a note, Lord Mansfield observes, in the case just cited, that he is an acceptor, not a drawer; and that, when the note is indorsed, the indorser stands in the situation analogous to that of drawer of a bill. He could not, indeed, stand in the situation of acceptor, because then he and the maker would both fill that character; and there cannot be two acceptors. *Jackson v. Hudson*. It is not necessary, therefore, to call in question the authority of *Penny v. Innes*. Here the defendant might have been sued upon the original consideration. But, if sued upon the note, he should have been declared against as indorser; in which case, it would probably have been held that he was estopped from setting up as a defence the want of an indorsement to himself.

LORD DENMAN, C. J. The under-sheriff has acted upon a misapplication of *Penny v. Innes*. The law there laid down as to the effect of indorsement might be correct as to a bill of exchange, but does not apply to a promissory note. The judgment of Tindal, C. J., in *Plimley v. Westley*,¹ seems intended not to overrule any thing laid down in *Penny v. Innes*, but to be consistent with what was there decided.

LITTLEDALE, J. The declaration here charges Edward Herbert as the maker of the note. It must be taken that, in point of fact, the note was made by Herbert Herbert. Then the question is, whether he is discharged, and a new instrument created, by Edward Herbert's name being put on the back of the note. I cannot understand how that should be so. It is said that, in the case of a bill of exchange, every indorser is a new drawer. But even that requires qualification. Bills are drawn according to the custom of merchants all over the world; and merchants would be much surprised at being told that an indorser might be considered a new drawer in all respects. It may be correct to say that an indorsement of a bill is in the nature of a new drawing.

But, supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker. The drawer of a bill is liable only after presentment to the acceptor; but the maker of a note is in the situation of acceptor. In this case, therefore, it cannot be said that the indorser became a maker, or that the putting of Edward Herbert's name on the back of this bill had, for the present purpose, cancelled the engagement of Herbert Herbert. The observation — which has been referred to — of Lord Ellenborough, in *Jackson v. Hudson* appears to me correct.

PATTESON, J. The issue here is, whether or not the defendant made the note. There is no conflict between the cases on this subject. The whole question turns on the distinction between a bill and a note. On a bill, each indorser is a new drawer, as was stated in *Penny v. Innes*; but the drawer of a bill is liable only on default made by the acceptor. The maker of a note is liable in the first instance; and, if each indorser became a maker, he also would be liable in the first instance. There is a difficulty, therefore, in the case of a note, which does not exist in that of a bill. The point in *Plimley v. Westley*¹ was, that the note not being on the face of it negotiable, the persons whose names appeared on the back were not indorsers, and might have been treated as makers, if the instrument had been properly stamped. Here the instrument was negotiable; so that the point discussed in *Plimley v. Westley* does not arise. This case is more like *Jackson v. Hudson*, where, the drawee having accepted a bill, and another person not a drawee having accepted it also, it was held that the latter could not be sued as an acceptor. So here the defendant was not a maker, but, as was said in that case, should have been declared against on his collateral undertaking. In the report of *Plimley v. Westley*,² the Lord Chief Justice says, "that a bill or note cannot be enforced against the original maker by a person who takes by indorsement, unless the instrument contains words which authorize the indorsement." A proper distinction is there kept in view. Some confusion has arisen in many of the cases, from not attending to the distinction between a bill and a note. The rule must be absolute.

WILLIAMS, J., concurred.

*Rule absolute.*³

¹ 2 New Ca. 249.

² 1 Hodges, 325.

³ *Thew v. Adams*, 6 Up. Can. o. s. 60; *Jones v. Ashcroft*, 6 Up. Can. o. s. 154; *West v. Bown*, 3 Up. Can. Q. B. 290, 291; *Fahnestock v. Palmer*, 20 Up. Can. Q. B. 307; *Smith v. Hill*, 1 All. (N. B.) 213, *accord.* — ED.

WILDERS AND OTHERS v. STEVENS.

IN THE EXCHEQUER, FEB. 11, 1846.

[*Reported in 15 Meeson & Welsby, 208.*]

ASSUMPSIT by the indorsees against the indorser of a bill of exchange. The declaration stated that T. & H. Wilders & Co., on, &c., made their bill of exchange for £40 12s., payable to their order, and directed the same to one J. Heigham, &c.; that Wilders & Co. indorsed the same to defendant, and the defendant then indorsed the same to the plaintiffs. The declaration then averred presentment to and nonpayment by Heigham, in the usual terms.

Plea: that the said T. & H. Wilders & Co. are the plaintiffs, and no other persons; that the plaintiffs and no other persons are the makers of the said bill and the persons to whose order the same was payable, and the persons who indorsed the same to the defendant, and who are liable to the defendant as such indorsers, in the event of payment of the same by him. Verification.

Replication: that before and at the time of the drawing and making of the said bill by the plaintiffs, and the indorsement thereof by the defendant, as in the declaration mentioned, Heigham was indebted to the plaintiffs in the sum of £40 12s.; and thereupon it was agreed between the plaintiffs and Heigham that, in consideration that Heigham would procure the defendant to indorse, and become surety as indorser to the plaintiffs of the said bill, the plaintiffs should give time to Heigham for the payment of the said debt of £40 12s.; that the plaintiffs thereupon afterwards, in pursuance and performance of the said agreement, drew and indorsed the said bill as in the declaration mentioned, and that the defendant, for the accommodation of Heigham, indorsed the same to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs of the said bill; that Heigham, after the said indorsement by the defendant, in further performance of the said agreement, delivered the said bill so indorsed by the defendant to the plaintiffs; that the plaintiffs, in performance of the said agreement, gave time to Heigham for payment of the said debt, and that no part thereof has been paid to the plaintiffs. Verification.

Special demurrer, assigning for causes that the replication admits the indorsement by the plaintiffs to the defendant, as in the plea mentioned; and that the plaintiffs were liable to the defendant thereon, and their promise thereby to pay him the amount of the bill, if the

drawee did not; and that it is inconsistent with such promise and indorsement of the plaintiffs, and is a circuity of action, for the defendant to be liable to them upon his indorsement, though made under the circumstances stated in the replication; and that, as the defendant is not by the replication alleged to have been a party to the agreement between the plaintiffs and Heigham, such agreement could form no consideration for the defendant's indorsement to the plaintiffs. Joinder in demurrer.

Petersdorff, in support of the demurrer. This replication is no answer to the plea. A party who has indorsed a bill of exchange to another, and has become liable as such indorser, cannot, on having the bill reindorsed to him by the other, bring an action against him on such indorsement. The reason of this rule is thus stated in Byles on Bills of Exchange, p. 114: "If a bill be reindorsed to a previous indorser, he has no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be to place the parties in precisely the same situation as before any action at all." On this ground it was held that, where C. made a promissory note to A., who indorsed it to B., by whom it was reindorsed to A., A. could not recover on the note against B. *Bishop v. Hayward*. [PARKER, B. Lord Kenyon there says that there might be circumstances which, if disclosed on the record, might entitle the plaintiff to recover; the question is, whether the replication here does not disclose such circumstances.] Admitting, however, that the defendant might be liable upon a declaration properly framed, this replication is bad for departure; for it does not support the declaration, but introduces facts inconsistent with it. Further, the facts stated in the replication show no sufficient consideration for the defendant's promise; for no consideration is shown to have existed between the defendant and Heigham, to whose agreement with the plaintiff the defendant is not alleged to have been a party. The objection arising from the circuity of action therefore remains, and prevents the plaintiffs from recovering on the bill against the defendants by reason of his indorsement to them.

Barstow, contra. The objection arising from the circuity of action is removed by the facts disclosed in the replication, which rebut the presumption raised by the plea as to the defendant having a counter right of action against the plaintiffs. The defendant may, under the circumstances stated on these pleadings, be treated as a new drawer of the bill (*Penny v. Innes*); and, if he were to sue the plaintiffs upon the bill, the facts stated in the replication would be an answer to the action. In Mr. Justice Story's book on Promissory Notes, pp. 479, 598, the principle is stated that the acts of parties to negotiable instru-

ments ought to be so interpreted as to carry their intentions into effect. Again, as to the supposed want of consideration, *Ridout v. Bristow* is an authority to show that a promissory note is binding, although it purports on the face of it to be given for the debt of another. The facts here alleged bring the case within the same principle. Nor is the objection as to the supposed departure of any weight; for the replication supports the declaration, by showing facts which entitle the plaintiffs to sue the defendant upon the bill, notwithstanding their previous indorsement to him. Besides, this objection is not pointed out by the demurrer. [He was then stopped.]

PARKE, B. I think *Mr. Barstow* has given a satisfactory answer to the objections taken in this case on behalf of the defendant. If the replication is a departure from the declaration, that ought to have been pointed out as a cause of special demurrer.¹ With respect to the main objection, although the old authorities are in some degree to the contrary, the modern decisions have settled the law in conformity with the view taken on behalf of the plaintiffs. The declaration shows a title to sue the defendant upon his indorsement; and the replication states circumstances sufficient to negative any right in him to sue the plaintiffs upon their indorsement to him. Then there is a sufficient statement of consideration; for the agreement of the plaintiff to give time to Heigham is a sufficient consideration for the defendant's promise to pay the note, by way of guarantee for him. The objection, therefore, as to the circuity of action being removed, inasmuch as the defendant could not sue the plaintiffs, the case is brought within those special circumstances which, it was said by the court, in *Bishop v. Hayward*, may exist, and which entitle the plaintiffs to recover against the defendant. Upon this state of the pleadings, therefore, it seems to me that the plaintiffs are entitled to our judgment.

ALDERSON, B. I am of the same opinion. The replication negatives the objection founded on circuity of action, which is the only objection to the plaintiff's right to recover in this action.

ROLFE, B., and PLATT, B., concurred.

*Judgment for the plaintiffs.*²

¹ The replication is not a departure. *Morris v. Walker*, 15 Q. B. 589. — Ed.

² *Smith v. Marsack*, 6 C. B. 486; *Morris v. Walker*, 15 Q. B. 589, *accord.* — Ed.

LECAAN v. KIRKMAN.

IN THE COMMON PLEAS, APRIL 21, 1859.

[Reported in 6 Jurist, New Series, 17.]

THE declaration stated that one C. F. Kirkman, by his promissory note, promised to pay to the order of the plaintiff £87 8s. two months after date; and the plaintiff indorsed the same to the defendant, and the defendant indorsed the same to the plaintiff; and the note was duly presented for payment, and was dishonored, &c. Pleas: first, traverse of the plaintiff's indorsement to the defendant; secondly, traverse of the defendant's indorsement to the plaintiff; thirdly, no consideration for the indorsement by the defendant to the plaintiff; fourthly, no notice of dishonor. Issues. The cause was tried on the 3d of December, 1858, before Cockburn, C. J., when a verdict was returned for the plaintiff; but leave was reserved to move to enter a verdict for the defendant, on the grounds that there was no evidence of the indorsement of the note by the defendant, and that the transaction was complete before the alleged indorsement by him, and therefore there was no consideration for his indorsement.

Edward James, Q. C. (*Holl* with him), having obtained a rule accordingly in Hilary term,

Griffiths now showed cause. The defendant's father being indebted to the plaintiff, and the plaintiff being desirous of getting security for his money, it was arranged that the son should indorse the father's promissory note as a surety for the father; and so there was a good consideration for the defendant's indorsement. The jury found that it was part of the transaction that the son (the present defendant) should indorse, as surety, to his father, the maker of the note. This is a case within the principle of *Gwinnell v. Herbert*, that the indorser of a promissory note does not stand in the situation of maker relatively to his indorsee. This case was not cited or regarded in *Ex parte Yates*.¹ The mode in which the indorsement took place is to be looked to. When the defendant put his name on the note, there was then there no indorsement by the payee (the plaintiff), though the note was payable to her order; she then put her name on the note, below the defendant's name. After the note became due, her name was struck out, and then again written on the note, but above the defendant's name. Now, it being part of the transaction, as found, that he was to indorse as surety, he is to be taken as having given, in

¹ 27 L. J. Bank, 9.

the course of the transaction, authority to her to put his name on the note at any time afterwards, so as to make his indorsement of significance. In *Morris v. Walker*,¹ the declaration was on a promissory note payable to the order of M., indorsed by M. to the defendant, and by the defendant to the plaintiff. Plea: that M., the payee of the note, and the indorser to the defendant, is the same person as the plaintiff. Replication: that the defendant indorsed for the maker; and the replication was held good. If here the plaintiff had in the first instance put her name on the note, and then asked the defendant to put his name below hers, the cases would have been alike. There are similar cases of bills of exchange. *Smith v. Marsack*,² *Wilders v. Stevens*.³ [BYLES, J. There is this difficulty: before the plaintiff put her name on the back, there was merely the name of the defendant on it; now, on that he would not be liable. Then the plaintiff puts her name under his; still he is not liable on that, because if she sues him he has his recourse to her.] That would have been so in *Morris v. Walker*, and the objection seems to be there anticipated. In fact, the question comes to this,— what was the true intention of the parties? The court will give effect to that. (Story on Promis. Notes, §§ 138, 479, p. 614.) [WILLES, J. In the case of *Ex parte Yates*, the Lords Justices, on overruling the case in the Queen's Bench, seem to have altogether overlooked the distinction between a bill of exchange and a promissory note. They lay down what is contrary to the common law, without hearing argument on the point, and apparently without thinking of the point at all, although they are overruling a decision of a court of law on a point of law. BYLES, J. The passage in Story treats of a regular indorsement.] The court is to draw inferences by the terms of the leave reserved. Why should they infer this not to be a good indorsement, and that the intention was not that he should be a surety? The jury have found that there was an agreement that he should be surety, and the defendant in substance authorized the plaintiff to do what was necessary to make him surety. His acknowledgment of his signature, though in the first instance put on at the wrong time, must be taken to give it the effect which it would have had if put on at the right time. [BYLES, J. He might, if he had told the innocent person that, have been estopped from denying it; but here he is not liable at common law as a surety, because of the Statute of Frauds; and he is not liable by the law-merchant, because he has not followed the law-merchant.] The intent of the parties, that there should be a binding promissory note, must govern. As to bills of exchange, the court has decided that.

¹ 15 Q. B. 589.² 6 C. B. 486.³ 15 M. & W. 208.

Montague v. Perkins,¹ Schutz v. Astley.² [COCKBURN, C. J. The plaintiff at the time had not present to her mind the difference between a bill of exchange and a promissory note.]⁸

COCKBURN, C. J. The rule must be absolute. There are two questions :⁸ first, whether there was an implied authority to the plaintiff to put her name above the name of the defendant on the back of the note, so as to constitute him an indorsee from her, thereby enabling him to indorse to her, and thus to make him liable to her as indorser. Now, I do not think it is necessary to decide whether there were not here such circumstances as made in favor of the payee in this respect, — whether, the payee not having first placed her name on the instrument, there can be such an authority as has been suggested : that, I think, it is not necessary to decide in this case, because there is no authority expressly given, and it cannot be implied from the facts of the case ; for the defendant, by the plaintiff's request, simply puts his name on this instrument *valeat quantum*, and we think we should not be justified from these facts in implying that she had any authority when there is no express authority. Therefore, in the absence of any express authority, it is not necessary to inquire what was sufficient to imply authority.

CROWDER, WILLES, and BYLES, JJ., concurred.

Holl, for the defendant, was not heard.

Rule absolute to enter a nonsuit.

MATTHEWS AND ANOTHER v. BLOXSOME.

IN THE QUEEN'S BENCH, MAY 3, 1864.

[Reported in 33 Law Journal Reports, 209.]

THE first count charged the defendant as indorser of a bill drawn by the plaintiffs on R. Bloxsome, payable to the order of plaintiffs.⁴

The second count charged the defendant as drawer of a bill addressed to R. Bloxsome, and payable to the order of plaintiffs.

The third count charged defendant as drawer of a bill addressed to R. Bloxsome, and payable to bearer.

¹ 17 Jur. 557.

² 2 Bing. N. C. 554.

⁸ The counsel for the plaintiff also contended, but unsuccessfully, that the evidence showed a waiver by the defendant of the laches of the plaintiff in giving notice of dishonor. The argument and opinions upon this point have been omitted. — ED.

⁴ The statement of the pleadings and evidence has been materially abbreviated.

The fourth count charged defendant as a guarantor.

Pleas: traversing the alleged indorsement, drawing, and guarantee by the defendant; also, to the first count, a demurrer.

The demurrer was argued on the 7th of June, 1861, when judgment was given for the defendant.¹

The action was tried before Blackburn, J., at the sittings in Middlesex, after Michaelmas term, 1861, when a verdict was directed for the defendant on the several issues joined, with leave reserved to the plaintiffs to move to enter a verdict for them, the court to have power to make all amendments which a judge might properly have made; and, upon motion, the court directed that a special case should be stated. The substance of the special case was that the defendant, with the design of becoming surety to the plaintiffs for R. Bloxsome, indorsed his name on the back of a blank-bill stamp, which was afterwards filled up to read as follows:—

“£50.

LONDON, Feb. 28, 1857.

“Forty-six months after date, pay to our order the sum of fifty pounds, for value received.

“To Mr. RICHARD BLOXSOME,

MATTHEWS & PEAKE.

“129 Regent Street.”

Across it was written, “Accepted. Richard Bloxsome.” And on the back of it was the name “Joseph Bloxsome.” The defendant received due notice of dishonor.

Hayes, Serjt. (*Udall* with him), for the plaintiffs. It must be conceded, since the judgment of this court on the demurrer to the first count, that the defendant cannot be treated as an indorser; but he may be treated as the drawer of a new bill. *Penny v. Innes*. *Burmester v. Hogarth*² is perfectly consistent with that case: indeed, it rather affirms it; and Parke, B., points out that the indorsement being in blank was equivalent to the drawing of a new bill payable to bearer, which is the form adopted in the third count.

Dowdeswell, for the defendant. Those cases, as well as *Hill v. Lewis*,³ were cited on the argument of the demurrer; but the court held the defendant was not liable; and the first count states the facts, so that judgment on general demurrer is equivalent to saying that the defendant could not be made liable at all. In *Penny v. Innes*, the bill was drawn before the indorsement; and, admitting that the putting one's name on the back of a blank-bill stamp is equivalent to an authority to fill it up with such a bill, commensurate with the stamp, as would make

¹ The case was thought unreportable at the time; and the reporter's note-book for Trinity term, 1861, has been unfortunately lost.

² 11 Mee. & W. 97.

³ 1 Salk. 132.

the person liable as indorser, still that was not done here. *Russel v. Langstaffe*.¹ The defendant was only to be second indorser, Edmands being joint security with him. He intended to be second indorser, and then he would have had Edmands to sue as well as the acceptor; but he could not maintain an action against the acceptor on the present bill, for the plaintiffs have never indorsed the bill; and it is only to their order that the acceptor promises to pay. The plaintiffs here are, in fact, prior parties to the defendant; and a prior party cannot sue a subsequent one. *Bishop v. Hayward*.

[COCKBURN, C. J. How could the plaintiffs have carried out the intention of the parties that the defendant should be surety for the acceptor to the plaintiffs?]

No doubt there might be a difficulty in doing so properly; but that is no argument that they have done so in this irregular way. [The arguments and judgments on the facts are omitted.]

COCKBURN, C. J. I am of opinion that our judgment must be for the plaintiffs on the third count. In my view, the question, whether the plaintiffs are entitled to recover against the defendant as drawer of the bill, is settled by *Penny v. Innes*. I also think the decision of this court on the demurrer was quite right, because the first count charged the defendant as indorser of a bill drawn by the plaintiffs to their own order; and, in point of law, the defendant was not indorser, and no title and no interest ever passed through him to the plaintiffs; and therefore he could not be liable as indorser. But I think the defendant is liable on the principle of *Penny v. Innes*. In that case, it is laid down as a general proposition that every indorser may be taken as the drawer of a fresh bill, according to the tenor and effect of the bill on which he puts his indorsement. There a stranger — that is, a person no party to the bill — intervened, and wrote his name on the back of the bill, and he was held liable as drawer; and the whole doctrine amounts to this, that a man who puts his name in this way as indorser, although not in legal acceptance an indorser, does what an indorser does, — he guarantees the payment by the acceptor at maturity. In that sense, he does what a drawer does; and so, although he cannot be an indorser, he may be treated as a drawer. And this is consistent with sound sense and justice: whether we look at the effect of the bill as a mercantile instrument or at the intention of the parties, the result is the same. The intention was that the defendant should guarantee the payment of £50 by his brother, the proposed acceptor, to the plaintiffs; and, before the bill was drawn, the defendant puts his name at the back; and the bill is then drawn in a way, as it turns out, in which he cannot be made liable as indorser

¹ 2 Dougl. 514.

though it is quite clear he intended to become liable as a surety for his brother. If we look simply at the instrument itself, we cannot consider whether the defendant's name was written before or after the bill was drawn; but, in point of fact, he has put his name, though a stranger, as indorser; and then, according to *Penny v. Innes*, the moment he does that he guarantees payment of the bill by the acceptor. In *Burmester v. Hogarth*,¹ it was sought to make the defendants liable as drawer and indorser by one act, and the bill was also described as drawn to order; whereas, in point of fact, the indorsement was in blank; so that, if the indorser were to be treated as a drawer, it ought to have been described as a bill payable to bearer.

BLACKBURN, J. I am of the same opinion. The facts appear to be that the defendant wrote his name across the back of a blank stamp for a £50 bill, with the intention that he should be surety for his brother to the plaintiffs for £50, to be paid at a certain date. The bill was then filled up by the plaintiffs as drawers, making it payable to their own order. On this arises the question, whether the defendant can be charged as drawer on an instrument so filled up. The effect of the defendant having given the plaintiffs' authority to fill up the bill is that he must be taken to be in exactly the same position as if he had put his name on the back after the bill had been drawn in its present form. Now, on the authorities (and *Penny v. Innes* is one), a person who puts his name on the back of the bill, under circumstances like the present, may be treated as a new drawer, inasmuch as every indorser of a bill is, at all events, in the position of a new drawer as far as guaranteeing payment. The question then arises, whether the bill would be correctly described as payable to bearer, as in the third count; or whether it would be more correct to describe it as payable to Matthews & Peake's order. Under the old system, it would have been a fatal variance to have misdescribed the bill, and it would therefore have been necessary to determine the question. As we have now power to amend, if necessary, it is immaterial, except so far as it is matter that must be considered, in deciding whether the instrument can operate so as to make the indorsement of the defendant equivalent to a new drawing. And certainly there was considerable force in the objection urged, that Richard Bloxsome had promised by his acceptance to pay to the order of Matthews and Peake, and not to bearer; and, as to the acceptor, he has only accepted one bill, and could only be made liable on that one bill; whereas, to treat the bill as payable to bearer would be to make him liable on two; and, as far as the acceptor is concerned, there might be a difficulty, as he could only be made liable to a person deriving title through Matthews and Peake; but, as against the defendant, he

¹ 11 Mee. & W. 97.

may have made himself liable, as upon a new instrument, although the effect of his indorsement is not to make a new instrument; and he might have bound himself, although there were no acceptor. My difficulty is to reconcile our present decision in favor of the plaintiffs with our former decision in favor of the defendant. I cannot now charge my memory with the grounds of that decision; but I recollect that I entertained considerable doubt at the time. And it certainly would seem to follow that, on the ground we now hold the defendant liable, we ought, on the count which sets out the true facts, to have held the objection that the defendant was not indorser only ground of special demurrer, and given judgment for the plaintiffs. On the present occasion, it is sufficient to say that the defendant made himself liable by his indorsement either as the drawer of a bill payable to bearer, or, according to the tenor and effect of the bill itself, of a bill payable to the plaintiffs' order.

MELLOR, J. I am of the same opinion. It is not necessary to say what the form of declaration ought to be; but I think the bill should be treated as payable to the plaintiffs' order. The substantial question is, whether or not a person who puts his name on the back of a bill in this way incurs any legal liability. I think his liability is in effect the same as a drawing by him; at least, so far as guaranteeing payment of the bill in the form in which it is accepted; that is, he guarantees to the payee payment to him of the amount.

SHEE, J. I agree that our judgment must be for the plaintiffs. This decision seems to me perfectly consistent with the judgment on the demurrer to the first count, which alleges title in the plaintiffs by indorsement from the defendant. It alleges that the defendant indorsed, which, as a stranger, he could not. But the defendant here may be treated as drawer; that is, as guaranteeing the payment of the bill by the acceptor, and that is in conformity with the decision in *Penny v. Innes*; and we could, indeed, come to no other conclusion conformably to that decision. A person in the defendant's position putting his name on the bill becomes a new drawer, so as to guarantee that the acceptor will pay to any person who can make out a legal title; and "bearer" may be treated as meaning the holder claiming under a legal title.

Judgment for the plaintiffs.

PRESIDENT, DIRECTORS, &C., OF THE UNION BANK OF WEYMOUTH AND BRAINTREE v. TILLEY WILLIS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1844.

[Reported in 8 Metcalf, 504.]

ASSUMPSIT by the indorsees against the indorser of a promissory note of the following tenor :—

“AUG. 8, 1843.

“For value received, I promise Tilley Willis to pay him, or order, \$350 in four months from date.

“T. D. THOMPSON.”

On the back was the name of B. L. Mirick & Co.; and under that name was the name of the defendant, both indorsements being in blank.

At the trial, before the Chief Justice, the plaintiffs' cashier testified that they discounted the note for Thompson; and that, when it was discounted, the names stood on the note as they now do. There was no evidence that the note was presented to Mirick & Co. for payment; but there was evidence tending to show that notice of dishonor was given to them as indorsers, as well as to the defendant.

The defendant contended that Mirick & Co. were to be considered as joint, or joint and several, promisors, and that the defendant was not responsible as indorser, without proof of presentment to them for payment. But it was ruled that they were not to be so considered as promisors, as that presentment of the note to them, and demand of payment of them, were necessary to charge the defendant. A verdict was returned for the plaintiffs, which is to be set aside, and a new trial granted, if the ruling was incorrect.

Clarke & Kingsbury, for the defendant.

White, for the plaintiffs.

The opinion of the court was delivered at October term, 1845.

HUBBARD, J. It is admitted that the note was not presented for payment to Mirick & Co.; and the question is, whether the omission to do it discharges the indorser.

If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say that a name written on the paper, which name was not that of the payee, nor following his name

on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the Statute of Frauds ; or that he should be treated, by third parties, simply as a second indorser ; leaving the payee and himself to settle their respective liabilities, according to their own agreement.

But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit.

The first case of this description of which any mention is made in the reports is that of *Sumner v. Parsons*, tried before this court in Lincoln County, July term, 1801. The facts were these : “ Parsons wrote his name on a paper and gave it to John Brown ; but there was no evidence of the intent, or of any connection in business between them. Brown made a note on the other side, payable to Jesse Sumner or order, on demand, with interest, and signed it, and, thirty days after, made a partial payment on it. Sumner then got a writing in these words, over the name of Parsons : ‘ In consideration of the subsisting connection between me and my son-in-law, John Brown, I promise to engage to guarantee the payment of the contents of the within note, on demand.’ And he sued Parsons, declaring on the promise, specially stating it, and the note, but did not aver any demand on John Brown, or notice to Parsons. In two trials in the Supreme Judicial Court, it was held that Parsons was liable, and that Sumner had a right to fill the indorsement so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, warrantor, or surety, liable in the first instance, and in all events, as a joint and several promisor would be.” *Amer. Prec. Declarations*, 113. Mr. Dane, who cites it in his *Abridgment*, Vol. I. 416, 417, remarks that “ this case was carried as far as any case had gone, and, on the review, the court was not unanimous ; and it has since been questioned.” And we have no doubt with good reason ; for the holder of the paper, having himself set out the contract by the words written over the name of the defendant, should have been held by its terms, and the legal effect should have been given to the material word “ guarantee.” And, in that view of the contract, the promise of Parsons was only to pay after a demand upon Brown for payment, and a refusal by him, and of which Parsons should have had notice. But the court must have construed the writing as constituting him an original promisor, and so bound, absolutely, without notice. And, in our apprehension, the writing of the guarantee over the name of Parsons ought not to have been held as an act obligatory on him ; but he should have been treated, if held at all, as an in-

dorser of the note, and, as such, subject to the liabilities, and entitled to the notice, of an indorser. See *Beckwith v. Angell*.¹

The next case which came before the court was that of *Josselyn v. Ames*.² By the report, it appears that John Ames was indebted on note to the plaintiff, who demanded security; and John offered his brother Oliver as surety, who was accepted. John then made a note to Oliver, not negotiable; and Oliver put his name on the back in blank. The plaintiff received it, and gave up his former note, and afterwards wrote over the defendant's name the same words as in *Sumner v. Parsons*, with this additional clause: "And in consideration of receiving from Elisha Josselyn a note of the said John of the same amount." The court held that the plaintiff could not recover in that action, but might cancel the words written, and substitute "For value received, I undertake to pay the money within mentioned to Elisha Josselyn," and, upon such an indorsement, might maintain an action upon the facts reported.

In what light the court held the defendant does not distinctly appear; but we presume as an original promisor, from the manner in which the case of *Sumner v. Parsons* is spoken of. "The guarantor in that case," they say, "was not the promisee, but a stranger, who warranted the payment to him. He cannot himself warrant to a third person payment of a note made payable to himself, and not negotiable."

The next reported case is that of *Hunt v. Adams*,³ which was *assumpsit* on a note given by Chaplin to Bennet, under which the defendant wrote: "I acknowledge myself holden as surety for the payment of the demand of the above note. Witness my hand. Barnabas Adams." This cause was much considered; and the court ruled that the defendant, Adams, was to be charged as a promisor, and that his holding himself as surety did not abridge or affect the plaintiff's rights, but only was evidence, as between the promisor and himself, that he had signed for his accommodation. Other cases between the same parties, on similar notes, afterwards arose, and were decided in the same manner. 6 Mass. 519.

Immediately after occurred the case of *Carver v. Warren*.⁴ That was on a note made by one Cobb to the plaintiff, and on the back of which the defendant wrote his name; and the plaintiff filled the indorsement, and declared upon it as his promise. The defendant demurred to the declaration, on the ground that this was but a promise to pay the debt of another, and was void for want of consideration. But the court

¹ 6 Conn. 325.

² 5 Mass. 358.

³ 3 Mass. 274.

⁴ 5 Mass. 545.

held that, by the pleadings, each promised to pay the same sum, and that the defendant's promise did not import any guarantee or collateral stipulation; and that if the defendant had indorsed as guarantor, and the present indorsement was filled up without his consent, or any authority from him, he should have pleaded the general issue, and on the trial he might have availed himself of this defence. And so the plaintiff had judgment on the demurrer.

The case of *Hemmenway v. Stone*¹ followed. There the note ran, "I promise to pay F. M. Stone, or order," and was signed, "B. Chadwick;" and below was signed by the defendant. The court held that it was a joint and several note, like the case of *March v. Ward*.² See also *Bayley on Bills* (2d Am. ed.), 44.

The next case was *White v. Howland*,³ which was on a note payable by one Taber to the plaintiff; and on the back of it was written, "For value received, we jointly and severally undertake to pay the money within mentioned to the said William White. I. Coggeshall, Jr. Jno. H. Howland." The court held that this undertaking was within the principle settled in *Hunt v. Adams*, and was the same as if the party had signed his name on the face of it; and that he was well charged as a several original promisor.

The case of *Moies v. Bird*,⁴ which succeeded, is substantially like the present. A note was made to the plaintiff, and signed by Benjamin Bird; and the defendant signed his name in blank on the back of the note. The court say, the defendant "leaves it to the holder of the note to write any thing over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as an original promisor."

In the case of *Baker v. Briggs*,⁵ which was an action to recover the amount of a promissory note made by one Ryan to the plaintiff, the name of the defendant, Briggs, was written on the back of it; and the court say that, according to several decisions, it was right to declare against him as promisor, though he stood in the relation of surety to Ryan, who signed the note on the face of it.

The case of *Chaffee v. Jones*⁶ was *assumpsit* on a note signed by Israel A. Jones, as principal, and Eber Jones and E. Owen & Sons, as sureties, by which they jointly and severally promised to pay the president, &c., of the Housatonic Bank, or their order; and the plaintiff put his name on the back of the note, in blank. The plaintiff was called upon, after the neglect of the makers; and he paid it to the

¹ 7 Mass. 58.² *Peake's Case*, 130.³ 9 Mass. 314.⁴ 11 Mass. 436.⁵ 8 Pick. 130.⁶ 19 Pick. 260.

bank. The court held that where one, not a promisor, nor indorser, puts his name on a note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated, nor a title made to it, through his indorsement; nor as guarantor, there being no distinct consideration; but he means to give security and validity to the note by his credit and promise, and it is immaterial, for this purpose, on what part of the note he places his name. So in *Austin v. Boyd*,¹ where the defendant's name was, in like manner, on the note, it was held that the party, by thus putting his name on the back, makes himself an original promisor. He intends by it to give credit to the note.

The case of *Samson v. Thornton*² was *assumpsit* on a note made by Benjamin Russell to the plaintiff, and was indorsed by the defendant, Thornton; and the declaration charged him as an original promisor. The court there ruled that the defendant, not being the payee of the note, must be held to stand in the character of an original joint promisor and surety.

The case of *Richardson v. Lincoln*³ is of the same type. There the court held that the defendant, not being payee, but having put his name in blank on the note, must be considered as an original promisor and surety, if he put it on simultaneously with the promisor as an original contractor. See also *Sumner v. Gay*.⁴

The same questions have arisen in New York, in various cases, and have been decided in a similar manner. They will be found cited in *Story on Notes*, §§ 59, 472-480, where the subject is fully discussed, and the authorities examined.

To hold the party, however, as promisor, where the name alone is written, it must appear that he made the promise at the time when the note itself was made; otherwise, he may either not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved. *Carver v. Warren*,⁵ *Tenney v. Prince*,⁶ *Baker v. Briggs*,⁷ *Oxford Bank v. Haynes*;⁸ *Story on Notes*, §§ 473, 474; *Beckwith v. Angell*.⁹ But that the promise was made at the same time with the note is a fact which is to be presumed when the note is in the hands of a *bona fide* holder, and nothing is shown to the contrary. And, in the present case, the note was offered to the plaintiffs for discount, by the maker himself, with the names of Mirick & Co., and Willis on the back of it; showing it, therefore, to have been an original undertaking on their part.

¹ 24 Pick. 64.² 3 Met. 275.³ 5 Met. 201.⁴ 4 Pick. 311.⁵ 5 Mass. 545.⁶ 4 Pick. 385.⁷ 8 Pick. 180.⁸ 8 Pick. 423.⁹ 6 Conn. 315.

It was contended, in the argument, that Mirick & Co. were merely sureties, and that the plaintiffs had a right to treat them as such, and therefore were not bound to demand payment of them as makers, as a necessary step to enable them to charge the indorser; the relation of promisor, surety, and guarantor being distinct. There is, unquestionably, a distinction between these several undertakings; and always so in regard to a mere guarantor. But, as to the subsisting relations between a principal and surety, they rarely affect the contract between creditor and surety. A man may be equally a surety and an original promisor; as where the promise is, I, A B, as principal, and I, C D, as surety, promise to pay; or where the party signs, and adds to his name the word "surety." This does not make him less a promisor. It only defines the relation between him and his co-promisor; and, as promisor, the necessity of a presentment to him is not dispensed with, if the intention of the holder of the note is to charge the indorser. It is not for the holder to choose in what character he will consider the party who has put his name on the note; but he must treat him as sustaining that legal relation which the facts establish. If he put his name on the note at the time it was made, like the case at bar, he is a promisor; if, after the making of the paper, he is a surety or a guarantor, according to the agreement upon which he gives his signature. The fixing of the relation of the party, when he enters into the contract, is necessary for the protection of holders, and for guarding the rights of indorsers, whose liability is conditional. If it were held otherwise, I do not well see how such contracts could be supported against the objection of being void as within the Statute of Frauds. And, as it is, I consider these engagements rather as exceptions to the statute than in any other light, and as growing out of, or rather engrafted upon, the law-merchant applicable to regularly drawn bills of exchange and promissory notes.

Upon this view of the law, as drawn from the various cases, we consider Mirick & Co. to have been joint and several promisors with Thompson, and liable in like manner with him.

The demand, in this case, was made on Thompson, the signer of the note, and notice was given to Mirick & Co. and to Willis, as indorsers; and it is now contended, by the plaintiffs, that if it should be held that Mirick & Co. are joint and several promisors with Thompson, and not indorsers, then the demand on Thompson is, in law, a demand on them also; and, such demand being proved, that the indorser, on due notice, will be bound.

The precise question here presented, we believe, has not been decided in any reported case. If the joint and several promisors are to be considered in the light of partners, then a notice to one must be esteemed a notice to all, as partners are but one person in legal con-

templation ; each partner, acting in such capacity, being not only capable of performing what the whole can do, and of receiving that which belongs to all, but by such acts necessarily binding all the partners. It follows, therefore, as an incident to such joint relations, that all the partners are affected by the knowledge of one. But, in respect to mere joint and several promisors on a note, there is not such absolute community of interest between them, nor such necessary connection with each other, as to constitute them partners. The relationship is confined to the present specific liability of a joint and several promise, and which cannot be extended by the act of one, so that his conduct shall necessarily bind the other. As between themselves, one promisor may be a mere surety, and the other the debtor ; one surety may have received security for lending his name, the other not. Or, if there are three joint and several promisors, two may be sureties, and the other the principal debtor, although the fact may not appear on the note.

As the incidents, then, of a partnership do not attach to such a limited joint liability, there being neither a community of interests nor joint participation of profit and loss, the fact of knowledge on the part of the whole, from the actual knowledge of one, does not follow as a presumption of law ; and a demand upon one is not therefore, in law, a demand upon the whole. If, then, the bringing home of knowledge to each, or proof of a demand upon each, is a fact necessary to be proved, in order to bind third persons, then such knowledge, or such demand on each, must be proved as any other fact.

A case arose in Connecticut, upon a note payable to two jointly, and by them indorsed in their individual names. One ground of defence was want of notice of non-payment ; and notice was proved to have been given to one only. The court held, after a careful consideration of the case, that a notice to one laid no foundation for an action against both, as each payee must indorse it, in order to transfer the title. *Shepard v. Hawley*.¹ This case, we think, involves and settles a principle similar to the one arising in the case at bar. And the Supreme Court of the State of New York strongly incline to a like view of the law, in a case (5 Hill, 234) where it was not necessary to decide the point. And Judge Story, who carefully considers the subject, in his work on Notes, is of the same opinion. Story on Notes, §§ 239, 255.

To apply the law to the facts as proved in the case before us, Thompson and Mirick & Co. stand in the relation of joint and several promisors. Payment of the note was demanded of Thompson, but not of Mirick & Co. The defendant is an indorser, liable only upon

¹ 1 Conn. 367.

legal notice of a demand upon the promisors, and a refusal by them to pay the note; and we are of opinion that he has a right to avail himself of this neglect to make demand on Mirick & Co., to discharge himself from his liability as indorser.

Verdict set aside, and a new trial granted.

HALL v. NEWCOMB.

IN THE COURT FOR THE CORRECTION OF ERRORS, NEW YORK,
DECEMBER, 1844.

[Reported in 7 Hill, 416.]

ON error from the Supreme Court. Hall brought an action against Newcomb in the New York Common Pleas, and declared against him in one count as maker, and in another as guarantor, of a promissory note, as follows:—

“NEW YORK, April 23, 1840.

“On demand, I promise to pay to Samuel Hall, or his order, two hundred and fifty dollars, for value received, with interest, until paid.

(Signed)

“PETER FARMER.

(Indorsed)

“OBADIAH NEWCOMB.”

On the trial, the plaintiff called Peter Farmer as a witness, who testified “that he signed the note in question, and the defendant indorsed it, as a mere accommodation to witness; that it was in part renewal of a former note, indorsed by the defendant for him, in like manner, for \$500; that he asked the defendant to indorse for half the amount, and he did so; that witness paid \$250, and gave this note for the balance to the plaintiff; that defendant drew the note, witness then signed it, and defendant indorsed it; that defendant knew witness was to get the money on it from the plaintiff; that the defendant had no interest in the notes or money; that a previous note had been drawn and indorsed, but the plaintiff did not like its form, and therefore the present note was drawn and indorsed, and the plaintiff accepted it; that whether he received the money from the plaintiff before he handed him the note, he could not say, but thought he received it previous thereto; that a demand of payment upon him of the present note had never been made.”

No further testimony was given, and the Common Pleas ordered a nonsuit, to which the plaintiff excepted. The Supreme Court affirmed the decision of the Common Pleas, and the plaintiff thereupon brought error to this court. For the opinion of the Supreme Court, see 3 Hill, 234 *et seq.*

J. J. Ring, for the plaintiff in error.

C. W. Sandford, for the defendant in error.

THE CHANCELLOR. In April, 1840, Peter Farmer made a promissory note for \$250, payable to Samuel Hall, the plaintiff, or his order, on demand, with interest; on the back of which note Newcomb, the defendant, indorsed his name in blank, at the request of Farmer, to enable him to get the money on the note. In November, 1841, Hall, without having demanded payment of the note from the maker, or given notice of nonpayment to the indorser, brought a suit against the indorser alone, to recover the amount of the note and interest. And the question for our consideration is, whether a person who puts his name in blank upon the back of a negotiable note, which is drawn in such a form that he may be charged as indorser in the usual mode, if a demand is made and notice of nonpayment given, can be charged as a general surety, without such demand and notice, by parol evidence merely. In the case of *Prosser v. Luqueer*, which was decided by this court in December last, I expressed the opinion that he could not. See 4 Hill's Rep. 420. The reporter misunderstood my opinion in that case, however, if he supposed I intended to intimate that I thought the holder of the note, which was recovered on there, could have maintained a joint action against the makers and the indorser of the note in a count charging them all as joint and several makers of the note. The joint action was sustained against them in that case upon the common money counts, under the statute, as makers and indorsers, and the service of a copy of the note with the declaration. But as the indorser had waived notice of nonpayment, and had absolutely guaranteed the payment of the money, for value received, I thought, upon the authority of the decisions there referred to, his guarantee was itself a several promissory note payable to the bearer of the note written by Edson and Arnold on the other side of the paper,¹ not that he could be considered as having made a joint promise with them.

The courts have gone far enough in repealing the statute to prevent frauds and perjuries, by introducing parol evidence to charge a mere surety for the principal debtor, by showing that his written agreement means something else than what upon its face it purports

¹ If Prosser be regarded as a maker of the same note signed by Edson and Arnold, it is difficult to see why his undertaking should be deemed several, instead of joint and several. And regarding him as the maker of another note, distinct from that of Edson and Arnold, as the Chancellor seems to have done, *quære* whether he was right in holding that the Act of 1832 was applicable to the case. See 2 R. S. 274, § 6, 2d ed.; *Miller v. McCagg*, 4 Hill, 34, 36, 37. *per* Bronson, J.; *Miller v. Gaston*, 2 id. 188.

to mean. And I fully concur in the opinion expressed by Mr. Justice Bronson in *Seabury v. Hungerford*,¹ that where a man writes his name in blank upon the back of a negotiable promissory note, he only agrees that he will pay the note to the holder on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he indorsed the paper to enable the maker to raise money on it does not change the nature of his legal liability as indorser, where the note is in the hands of a *bona fide* holder for a good consideration. Such was the whole effect of the parol proof in this case. And for the courts to allow proof by parol to charge a mere surety, beyond the legal effect of his written blank indorsement on such paper, would bring them in direct conflict with the provisions of the Statute of Frauds. 2 R. S. 135, § 2, sub. 2.

Here there was no difficulty in charging Newcomb as indorser of the note, in favor of Hall, from whom it appears the maker intended to get the \$250, to enable him to take up a former note. It does not appear in this case whether the former note had been protested, so as to charge Newcomb as indorser, or not, or who was the holder of that note. All that appears is, that Newcomb knew that Hall would lend Farmer the \$250 to enable him to take it up; and that Newcomb indorsed this note for Farmer, as a mere accommodation indorser, when the name of Hall, to whose order the note was made payable, was not indorsed thereon. Where a note is made payable to an individual or his order, and is indorsed by him in blank, and in that situation is presented to another person for his accommodation indorsement, who indorses it accordingly, the legal effect of his indorsement is to make him liable in the character of second indorser merely, and he can in no event be made legally liable to the first indorser. And if the maker, or the first indorser, or any other person into whose hands the note might subsequently come, should, without the consent of the second indorser, fill up the first indorsement specially, without recourse to such first indorser, so as to deprive the second indorser of his remedy over in case he should be compelled to pay the note, it would be a gross fraud upon him, if not a forgery. But when such a note is presented to the accommodation indorser, and is indorsed by him without having been previously indorsed by the person to whose order the same is made payable, the latter may, at the time he puts his indorsement upon it, indorse it specially without recourse to himself, so as to leave the second indorser liable to any person into whose hands it may subsequently come for a good consideration, and without any remedy over against the first indorser. Or, if the object of the second indorser

¹ 2 Hill's Rep. 80.

was to enable the drawer, as in this case, to obtain money from the payee of the note, upon the credit of such accommodation indorser, he may indorse it in the same way without recourse, and by such indorsement may either make it payable to the second indorser or to the bearer. And such original payee may then, as the legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser; or he may recover on the common money counts, under the statute, by serving a copy of the note, and of the indorsements so made thereon, with his declaration. But as the second indorser, if he has not waived notice of the demand of and nonpayment by the maker, cannot be made liable upon his indorsement without proof of such demand and notice, the plaintiff at the trial must prove the same, or he cannot recover.

In the case of *Herrick v. Carman*,¹ the payees of the note, who had received it on the credit of Herrick, had themselves made a general indorsement of the note, instead of a restricted one; so that if Carman recovered against Herrick, who had been duly charged as indorser, the original payees would be liable to him as first indorsers; and a recovery by Carman would therefore have rendered them liable, contrary to their agreement with him. And in *Tillman v. Wheeler*² the payee of the note attempted to charge the indorser as upon a general guarantee, without having made him liable as indorser by a demand of the makers of the note, and notice of its nonpayment. Both cases, therefore, were rightly decided. The remarks of the judges as to the right of the court to turn an indorsement into an absolute guarantee, upon a different state of facts, were uncalled for, and are therefore not entitled to the weight of judicial decisions in opposition to the provisions of the Statute of Frauds. The decision of the majority of the Supreme Court in the case of *Nelson v. Dubois*³ was clearly wrong. The note in that case being payable to Nelson or bearer, the defendant might have been charged as the indorser of the note, without any indorsement by Nelson. For where a note payable to bearer is indorsed by another person generally, the person who thus puts his name upon it is liable as an indorser, and may be charged as such upon due notice to him of demand and nonpayment of the note by the maker. *Hill v. Lewis*,⁴ *Bank of England v. Newman*,⁵ *Eccles v. Ballard*,⁶ *Brush v. The Administrators of Reeves*.⁷ It was improper therefore to allow parol evidence to enable the holder of the indorsement to turn a con-

¹ 12 Johns. Rep. 159.

² 17 Johns. Rep. 326.

³ 13 Johns. Rep. 175

⁴ Skin. Rep. 410.

⁵ 1 Ld. Raym. Rep. 442.

⁶ 2 McCord's Rep. 388.

⁷ 3 Johns. Rep. 440

ditional liability, as indorser, which the plaintiff had lost the benefit of by his neglect to give notice of demand and nonpayment, into an absolute contract to pay the note, in disregard of the provisions of the Statute of Frauds. In declaring specially upon such an indorsement, the proper course is to set out the making of the note, the special indorsement thereof by the plaintiff to the defendant, where it is payable to order, or the delivery to him where it is payable to bearer, or to the plaintiff or bearer, and then to state the subsequent indorsement of the note by the defendant, by which he ordered and appointed the contents thereof to be paid to the plaintiff, and the demand of the maker of the note and notice of nonpayment duly given to the defendant as such indorser. The erroneous decision of the majority of the judges of the Supreme Court in *Nelson v. Dubois* not having received the sanction of this court, and being in conflict with the Statute of Frauds, it is not too late to declare the law in conformity to the statute, as a majority of the judges of the present Supreme Court have done in this case. I conclude, therefore, that the decision of the Common Pleas in this case was right, and that the judgment of the Supreme Court sustaining that decision was not erroneous, and should be affirmed.

Senators BARLOW and WRIGHT delivered opinions in favor of affirming the judgment of the Supreme Court, concurring in the view taken of the case by the Chancellor.

BOCKEE, Senator. It appears very satisfactorily from the testimony in this cause, and the nature of the transaction, that the parties intended to give a note or security on which Newcomb, as well as Farmer, should be liable to the plaintiff for the money to be advanced by him. They failed in effecting that object in the usual form of an indorsed promissory note, probably from mistake or ignorance of the proper form of negotiable instruments. In the form in which the note is presented to us, Newcomb cannot be treated as an indorser. An indorser is one who, by his signature, transfers the legal interest in the note. From such indorsement, whether the signature is on the back or the face of the note, result the liabilities and privileges of a commercial indorser. Newcomb had no such legal interest in the note, and could not make such an indorsement, because the note is payable to Hall, and is not indorsed by him. Newcomb can never be made liable to Hall as indorser. The payee of a note cannot maintain an action against the indorser. So it was ruled in the case of *Herrick v. Carman*,¹ where the indorsee failed in maintaining an action against the second indorser, because it was proved that he was

¹ 10 Johns. Rep. 224.

the mere agent of the payee and first indorser. Taking this note in the precise form in which it is, payable to Hall, with the signature of Newcomb on the back of it, and laying aside all the other testimony in the cause, it would be the case of *Herrick v. Carman* above cited, and Newcomb could not be made liable in any form. Had Newcomb put his name on a note designed for discount at a bank or otherwise, intending to be the second indorser, and knowing that his indorsement would be inoperative until the note was indorsed by the payee, he would then be strictly within the rule applicable to a commercial indorsement, and entitled to its privileges. The evidence in this case, however, excludes such a supposition. It is very clear that Newcomb put his name on the note, knowing that the money was to be obtained from Hall, the payee. The inference is very strong — at least a jury might think so — that Newcomb intended to be surety for the money so advanced by Hall to Farmer, and did not intend to make himself the indorser of a negotiable promissory note. The signature of Newcomb is a nullity, unless he is liable as guarantor, or on an original undertaking as surety, to pay the note. It is immaterial in which character he is made liable. Here we may safely rest upon the principle laid down by the Supreme Court in the decision of this cause, — that such a construction should be given to the contract as will prevent its failure altogether. The maxim, *ut magis res valeat quam pereat*, quoted by the learned judge, comes in aid of the plaintiff, and is decisive in his favor. It is suggested by the learned judge who delivered the opinion of the Supreme Court, and the decision appears to be mainly founded upon this suggestion, that the plaintiff, by indorsing the note, might have put it in a form in which it would be available to the holder against Newcomb as second indorser. True, he might have indorsed the note and sent it into the market, so that an innocent *bona fide* holder might have recovered against Newcomb as second indorser; but in such case Hall, as first indorser, would have been liable to Newcomb. The order of liability would be reversed. Hall would become surety to Newcomb, instead of holding Newcomb as surety for Farmer.

It is said that Hall might have indorsed the note without recourse, and then, although he was the payee and first indorser, might himself have recovered as the indorsee of Newcomb. This would be placing Hall in a position never intended by the contract. I think we must take this instrument and decide the rights of the parties under it in the precise shape and form in which it appears to us, without indorsement by the payee. Viewing this instrument as commercial paper, indorsed by Newcomb for the accommodation of the maker, I doubt the right of the payee to negotiate it by a restricted indorsement, in

which case it might operate as a fraud upon the person who puts his name upon the note with the view of being the second indorser. If the payee makes such indorsement, I think it would not avail. An indorsement is strictly and literally an order to pay money. Hall orders the money to be paid to Newcomb, whose name already stands upon the note, we may presume, as second indorser. He writes over Newcomb's signature an order to pay back the money to himself. By this little contrivance it is supposed that a right of action would accrue to Hall against Newcomb as indorser, when he had not before any such right of action. This sort of finesse and shuffling game is below the dignity of the law. We must take this contract as the parties left it, complete and perfected when the note was delivered to Hall; and we have no right to ask him to resort to practices bordering on trick and deception, for the purpose of changing the character and liability of the parties. If Mr. Hall could legally and properly pursue the course advised by some of our learned friends, I can see no reason why a restricted indorsement may not be written over the name of any prior indorser of accommodation paper, and so the person who has lent his signature on the faith of the responsibility of those who have preceded him may be utterly ruined, and that without remedy. I think that Judge Spencer, in the case of *Herrick v. Carman*,¹ states the law of this case correctly, and draws the proper distinction. Where a person indorses a note for the purpose of giving the maker credit with the payee, and with knowledge of the use to be made of the note, he is liable as on an original undertaking, and his indorsement may be turned into a guarantee. Otherwise, if he indorses the note without any such knowledge. It must then be presumed that he intended only to become a second indorser, with all the rights which pertain to that character. In the latter case, he is not liable to the payee, nor to any person deriving title from him with knowledge of the circumstances attending the indorsement. This principle has, I think, been recognized and sanctioned by every analogous case to be found in the books from 12 Johns. down to 5 Hill, and ought at this day to be considered as settled and established law, if in the conflict of decisions and diversity of opinion among judges any principles can be considered as settled and established. The case of *Seabury v. Hungerford*,² on the authority of which the decision of the Supreme Court mainly rests, is not an exception. The principle of that case is not adverse to the present plaintiff's right to recover. The maker drew a note payable to Seabury or bearer, with a view of borrowing money from him, which note, before delivery, was indorsed by Hungerford; and it was held that Hungerford could not

¹ 12 John. Rep. 161.

² 2 Hill, 80.

be charged as maker or guarantor, but only as indorser. Now two remarks may be made explanatory of the difference between that case and the present. It does not appear that Hungerford knew that the money was to be advanced by the payee, and it is not disputed that, on a mere naked indorsement of negotiable paper, unconnected with knowledge of the use to be made of it, the party could be charged only as indorser. It may be further remarked that the note in that case was payable to Seabury or bearer, and the observation of Judge Cowen would be apt and pertinent, that the payee might, by transferring the note, render it available to any holder against Hungerford as indorser. Not so in the present case, where, though words of negotiability are used, they are entirely inoperative, and might as well have been left out of the instrument. The plaintiff could not have transferred the note without involving himself in responsibilities never intended, and entirely inconsistent with the contract between the parties. Then let the rule of *Seabury v. Hungerford* be applied to this case; and as there is no possibility of charging Newcomb as indorser, consistently with the contract and intention of the parties, and as he knowingly undertook to be surety for Farmer to Hall in some form, he must be held liable either as guarantor or as an original promisor. He may be sued in either character.

Another point made on the argument of this cause is, "that the Statute of Frauds would bar a recovery against the defendant on any other ground than that of an indorser." The case of *Leonard v. Vredenburg*¹ is exactly analogous to the present, and appears to settle the principle very conclusively in favor of the plaintiff. Here, as well as there, the undertaking was a part of the original transaction, and the defendant's undertaking was the inducement to the creation of the debt. Parol testimony was admitted without objection on the trial, and was properly admitted to show the attending circumstances, and the purpose and design for which the signature of the defendant was affixed to the instrument.

The nonsuit was improperly granted, and the judgment of the Court of Common Pleas and of the Supreme Court are erroneous, and should be reversed.

Senators PORTER and PUTNAM also delivered opinions in favor of reversing the judgment of the Supreme Court.

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows:—"—

For reversal: Senators BACKUS, BOCKEE, JOHNSON, LESTER, PORTER, PUTNAM, RHOADES, and VARNEY, — 8.

¹ 8 Johns. Rep. 29.

² *Nelson v. Dubois*, 13 Johns. 175; *Campbell v. Butler*, 14 Johns. 349, *contra* and overruled.

For affirmance: The CHANCELLOR and Senators BARLOW, BARTLIT, BURNHAM, CHAMBERLAIN, DENNISTON, FAULKNER, JONES, LAWRENCE, MITCHELL, PLATT, SCOTT, SCOVIL, SMITH, STRONG, WORKS, and WRIGHT, — 17.

*Judgment affirmed.*¹

MOORE v. CROSS.

IN THE COURT OF APPEALS, NEW YORK, JUNE, 1859.

[Reported in 19 New York Reports, 227.]

APPEAL from the Supreme Court. The complaint averred the making of a promissory note by the defendant McGervey, payable to the order of the plaintiff, and that it was indorsed by the defendant Cross, for the purpose of paying for coal, sold and delivered by the plaintiff to McGervey on the credit of such indorsement, and was delivered thus indorsed to the plaintiff, with the privity of Cross, in payment for coal then sold and delivered. Upon the trial before a referee, the complaint was proved in substance; and he reported in favor of the plaintiff. The judgment thereupon entered was affirmed on appeal at general term in the first district; and the defendant cross-appealed to this court.

S. F. Clarkson, for the appellant.

D. McMahon, for the respondent.

JOHNSON, C. J. This action is upon a promissory note made by one McGervey, payable to the order of James Moore, and indorsed in blank by John A. Cross, James Moore, and John McNamee. The plaintiff is the James Moore to whose order the note is payable. It was proved that, upon a negotiation for a sale of coal by Moore to McGervey, Moore agreed to sell him the coal for his note, indorsed by Cross, and that for this purpose Cross indorsed the note. The sale, accordingly, took place; and the coal and the note indorsed by Cross were respectively delivered. The note was discounted for Moore at the Atlantic Bank, and, being unpaid at maturity, was duly demanded, and notice duly given to Cross. It was subsequently

¹ This case was twice argued, — once in 1843 and again in 1844. After the first argument, the members of the court were equally divided upon the question, the vote being as follows: —

For reversal: The PRESIDENT and Senators BOCKEE, DIXON, FRANKLIN, PORTER, PUTNAM, RHOADES, SHERWOOD, and VARNEY, — 9.

For affirmance: The CHANCELLOR and Senators BARTLIT, DENNISTON, ELY, FOSTER, HOPKINS, MITCHELL, PLATT, and WRIGHT, — 9. *Reargument ordered.*

taken up at the bank by Moore, the plaintiff. The question is, whether, on this state of facts, Moore can recover in this action against Cross.

It is quite conceivable that, in the ordinary course of business, a promissory note may, before it falls due, come to the hands of a person who already appears upon it as payee or indorser. In such a case, he cannot maintain an action against any of the parties whose indorsements are subsequent to the first appearance of his name. The legal reason is, that each of those persons, on paying to him the note, would have an immediate right to demand payment from him on his earlier indorsement. The law, to avoid this circuitry, denies an action to a party thus situated. If the note had passed through his hands without indorsement, or if it had been indorsed without recourse by him, the reason would not exist; and there could be no objection, founded on his prior holding or indorsement, to the maintenance of an action by him against the parties liable on the note.

Again, if a note be made and indorsed for the accommodation of A, who indorses it to another person, and afterward, in the course of trade, again becomes the holder, he could maintain no action against the maker and indorser for his accommodation, notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the action; and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing. This, in principle, is very like what the plaintiff seeks to maintain in this case. Having brought his action as holder, and producing the paper indorsed in blank, he has, *prima facie*, made out a title as such; and, to rebut the inference which arises on the face of the paper, that a recovery by him against Cross would only lead to a new recovery by Cross against him, he shows that the defence of circuitry is not available against him, inasmuch as Cross could have, by the original agreement of the parties, no recovery against him. The case is, as to its legal merits, the same as if Cross had taken up the paper from the bank, and brought an action against Moore as payee; and, in such a case, no one could doubt the competency of the proof of the facts now in proof, or their conclusiveness to defeat Cross's action. *Labron v. Woram*.¹ Between parties thus standing in immediate privity with each other, an action could no more have been maintained by Cross against Moore than it could, had Moore been strictly an accommodation indorser for Cross.

¹ 1 Hill, 91.

When this note was originally in Moore's hands, the blank indorsement of Cross could have been rendered entirely conformable to the real agreement and object of the parties by Moore's making his own indorsement without recourse in terms. Upon such an indorsement, the paper would no longer have afforded a *prima facie* answer to Moore's action against Cross; nor could Cross have maintained that such an indorsement was unwarranted, as it would have exactly carried out the intention of the parties. Between these parties, I can see no reason why the indorsement might not thus have been made at the trial; or why it may not now, being a mere matter of form, and the right to make it being proved, be treated as made.

Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guarantee, and charging the indorser as a maker or guarantor. This doctrine was advanced in *Herrick v. Carman*,¹ and was adjudged in *Nelson v. Dubois*² and *Campbell v. Butler*.³ It was attacked in *Dean v. Hall*⁴ and in *Seabury v. Hungerford*,⁵ and was finally overthrown in *Hall v. Newcomb*,⁶ and the same case in error. The Chancellor, in his opinion in the latter case, says: "If the object of the second indorser was to enable the drawer to obtain money from the payee of the note upon the credit of the accommodation indorser, he may indorse it without recourse; and, by such indorsement, may either make it payable to the second indorser or to the bearer. And such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser." He proceeds to say that the party might proceed on the common counts, giving a copy of the note and indorsements; but that he must, in either case, show demand and notice to charge the indorser. In *Spies v. Gilmore*,⁷ the doctrine came before this court under slightly different circumstances. Want of demand and notice were held to be excused, upon the circumstances of the case, in the Superior Court. In this court, it was discussed and decided on the question of the sufficiency of the excuse; and not an intimation is to be found throwing any doubt upon the position that, had those defects not existed, the plaintiff might have recovered. The later cases of *Brown v. Curtis*,⁸ *Hall v. Farmer*,⁹ and *Dunham v. Manrow*,¹⁰ being upon written guarantees, and not upon indorsements, are not applicable to this case.

¹ 12 John. 160.² 13 John. 175.³ 14 John. 349.⁴ 17 Wend. 214.⁵ 2 Hill, 80.⁶ 3 Hill, 233.⁷ 1 Comst. 321.⁸ 2 Comst. 225.⁹ 2 Comst. 553.¹⁰ 2 Comst. 533.

The cases of *Herrick v. Carman*¹ and *Tillman v. Wheeler*² are entirely in harmony with this view. In neither of them was it made to appear that the second indorser put his name on the paper to give the maker credit with the payee. On that ground, each of them was decided; while the whole scope of the opinions shows that, with that proof, the court would have sustained a recovery. The case of *Waterbury v. Sinclair*³ sustains the general position of the plaintiff, as do the opinions of Mr. Justice S. B. Strong and Mr. Justice Emott; though the decision of the former was overruled upon the ground that there should have been an actual indorsement without recourse. It seems to me that, under the present system, if a right so to indorse appears (and it may be done even at the trial), that substantial justice is promoted by regarding it as done, and looking upon its actual doing as the merest matter of form.

The recovery was founded on correct legal principles. The fact that an indorsement without recourse would present exactly such a case as might frequently happen in the transaction of business, and, if so happening, would strike no one as violating the ordinary theory of promissory notes, shows that the real rights of these parties are capable of being enforced without violence to any rule of law under the contract they have actually made.

All the judges concurring,

Judgment affirmed.



CHARLES O. BOYNTON v. DANIEL PIERCE AND ANOTHER.

IN THE SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1875.

[Reported in 79 Illinois Reports, 145.]

APPEAL from the Circuit Court of DeKalb County; the Hon. Theodore D. Murphy, Judge, presiding.

Mr. R. L. Divine, for the appellant.

Mr. A. C. Allen, for the appellees.

MR. CHIEF JUSTICE SCOTT delivered the opinion of the Court.

The declaration in this case contains special counts upon a guarantee of a promissory note made by W. C. Wilcox to plaintiffs. At what time defendant's name was written upon the back of the note, whether at the date of making or subsequently, the evidence is silent. With the plea of *non assumpsit*, defendant filed an affidavit of the truth of

¹ 10 John. 224; 12 John. 159.

² 17 John. 326.

³ 16 How. Pr. 329.

the plea. On the trial, plaintiff's counsel, in the presence of the court, wrote the guarantee declared on, over defendant's name, on the back of the note, and, after proof of signature, offered the note and indorsement in evidence, which were by the court admitted over objection of defendant.

One of the causes assigned for a reversal of the judgment is that the court erred in permitting the note and indorsement to be read in evidence without proof that the undertaking of defendant, as evidenced by the blank indorsement, was, in fact, that of a guarantor. The position assumed cannot be maintained. Defendant was not the payee of the note, but a third party; and, from the fact his name is found written on the back of the note, it will be presumed, in the absence of explanatory evidence, he placed it there at the time of making the note, and that he indorsed it as guarantor. The blank indorsement was authority to plaintiffs to write over his signature any thing that was consistent with defendant's undertaking and the intention of the parties. Primarily, it would appear defendant's obligation was that of a guarantor, and hence it was proper to write the guaranty over his name on the back of the note. All that was necessary to be proven under the pleadings was the signature of the defendant; and, that proof being made, the note and indorsement were properly admitted as evidence. *Camden v. McKoy*,¹ *Hance v. Miller*.²

No doubt the rule would be different where the name on the back of the note is that of the payee. No presumption will be indulged he indorsed the note as guarantor, and if the holder writes a guarantee over the signature, which is denied under oath, the burden of proof will be upon plaintiff to show a contract of guarantee was intended. This is the rule declared in *Dietrich v. Mitchell*.³

But one point insisted upon is fatal to the present judgment. As a matter of defence, defendant offered to prove his liability, if any existed by reason of the indorsement on the back of the note, was only that of guarantor of collection, or a mere indorser, but was denied the privilege. Under the former decisions of this court, this was proper evidence. It has been repeatedly held, the presumption a party, not a payee, who places his name on the back of a note, is a guarantor, may be rebutted by parol evidence. The character of the liability assumed may be explained and the legal presumption rebutted. *Camden v. McKoy*,⁴ *Cushman v. Dement*,⁵ *White v. Weaver*.⁶ The reasoning in *Dietrich v. Mitchell*⁷ is consistent with the doctrine of the cases cited, and, indeed, we find nothing in all the cases in this court on this subject that militates against this view of the law.

¹ 3 Scam. 437.² 21 Ill. 636.³ 43 Ill. 40.⁴ *Supra*.⁵ 3 Scam. 497.⁶ 41 Ill. 409.⁷ *Supra*.

Hence the court ought to have permitted defendant to show the character of his undertaking as evidenced by the blank indorsement, — whether it was an absolute guarantee or a guarantee of collection, or whether he was a mere indorser, under the statute, according to the understanding of the parties at the time.

For the error in excluding the evidence tendered, the judgment will be reversed and the cause remanded. *Judgment reversed.*

MR. JUSTICE SHELDON dissents upon the last point.¹

¹ The erroneous assumptions that a prior indorser can never sue a subsequent indorser, and that a blank signature is of itself a written contract, together with the misapplication of the presumption that every one knows the law, and the introduction of arbitrary and conflicting presumptions as to the intention of the parties, have produced almost endless litigation and a chaos of decisions upon a question which ought to have occasioned but little or no controversy.

As matter of positive decision, the cases may be classified as follows : —

I. One who writes his name upon the back of a (negotiable) note before its delivery to the payee is presumed in the following jurisdictions to assume, by this anomalous indorsement, a liability of some kind to the payee: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Utah, Vermont, and Virginia.

This presumption, however, is a presumption of fact merely, and evidence is accordingly admissible to show that, by the understanding of the parties, the anomalous indorser was to occupy the position of an ordinary second indorser with all the rights, and only the obligations incident thereto. See, in addition to the cases cited *infra*, *Pierce v. Mann*, 17 Pick. 244; *Howe v. Merrill*, 5 Cush. 80; *Clapp v. Rice*, 13 Gray, 403; *Patch v. Washburn*, 16 Gray, 82; *Currier v. Fellows*, 27 N. H. 366.

If, however, the presumption of liability to the payee is not rebutted, a second presumption arises as to the nature of this liability.

a. In Arkansas, Colorado, Delaware, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Rhode Island, South Carolina, Texas, Utah, and Vermont, the anomalous indorser is presumptively a maker of the note he has indorsed. *Killian v. Ashley*, 24 Ark. 511; *Good v. Martin*, 1 Col. 165; 2 Col. 218, s. c.; *Massey v. Turner*, 2 Houst. 79; *Gilpin v. Marley*, 4 Houst. 284; *Colburn v. Averill*, 30 Me. 810; *Malbon v. Southard*, 36 Me. 147; *Leonard v. Wildes*, 36 Me. 265; *Lowell v. Gage*, 38 Me. 35; *Brett v. Marston*, 45 Me. 401; *Sturtevant v. Randall*, 53 Me. 149; *Sullivan v. Violet*, 6 Gill, 181; *Ives v. Bosley*, 35 Md. 262; *Walz v. Alback*, 37 Md. 404; *Moies v. Bird*, 11 Mass. 436; *Sumner v. Gay*, 4 Pick. 311; *Baker v. Briggs*, 8 Pick. 122; *Chaffee v. Jones*, 19 Pick. 260; *Austin v. Boyd*, 24 Pick. 64; *Samson v. Thornton*, 3 Met. 275; *Richardson v. Lincoln*, 5 Met. 201; *Benthall v. Judkins*, 13 Met. 265; *Bryant v. Eastman*, 7 Cush. 111; *Pray v. Maine*, 7 Cush. 253; *Hawkes v. Phillips*, 7 Gray, 284; *Pearson v. Stoddard*, 9 Gray, 199; *Wright v. Morse*, 9 Gray, 337; *Essex Co. v. Edmands*, 12 Gray, 273; *Brown v. Butler*, 99 Mass. 179; *Nat. Bank v. Lougee*, 108 Mass. 371; *Stoddard v. Penniman*, 108 Mass. 366; *Way v. Butterworth*, 108 Mass. 509; *Rothschild v. Grix*, 31 Mich. 150; *Pierce v. Irvine*, 1 Minn. 369; *Rey v. Simpson*, 1 Minn. 380; *Winslow v. Boyden*, 1 Minn. 383; *McComb v. Thompson*, 2 Minn. 139; *Marienthall v. Taylor*, 2 Minn. 147; *Peckham v. Gilman*, 7 Minn. 446; *Robinson v. Bartlett*, 11 Minn. 410; *Perry v.*

Barret, 18 Mo. 140; *Schneider v. Schiffman*, 20 Mo. 571; *Baker v. Block*, 30 Mo. 225; *Beidman v. Gray*, 35 Mo. 282; *Western Boatmen v. Wolff*, 45 Mo. 104; *Kuntz v. Tempel*, 48 Mo. 71; *Seymour v. Farrell*, 51 Mo. 95; *Cahn v. Dutton*, 60 Mo. 297; *Chaffe v. Memphis R. R.*, 64 Mo. 193; *Martin v. Boyd*, 11 N. H. 385; *Benton v. Willard*, 17 N. H. 593; *Sargent v. Robbins*, 19 N. H. 572; *Baker v. Robinson*, 63 N. Ca. 191 (a note payable to bearer); *Bright v. Carpenter*, 9 Oh. 139; *Robinson v. Abell*, 17 Oh. 36 (a note payable to bearer); *Greenough v. Smead*, 3 Oh. St. 415; *Seymour v. Leyman*, 10 Oh. St. 283; *Seymour v. Mickey*, 15 Oh. St. 515; *Matthewson v. Sprague*, 1 R. I. 8; *Perkins v. Barstow*, 6 R. I. 505; *Frampton v. Dudley*, 1 N. & McC. 128 (a note payable to bearer); *Stoney v. Beaubien*, 2 McMull. 313; *Baker v. Scott*, 5 Rich. 305; *Ambler v. Hillier*, 9 Rich. 243; *Carpenter v. Oaks*, 10 Rich. 17; *McCelvey v. Noble*, 12 Rich. 167 (a note payable to bearer); *McCreary v. Bird*, 12 Rich. 554. (Conf. *Tuten v. Ryan*, 1 Speers, 240.) *Chandler v. Westfall*, 30 Tex. 475 (a note payable to bearer); *McGee v. Connor*, 1 Utah, 92; *Knapp v. Parker*, 6 Vt. 642; *Flint v. Day*, 9 Vt. 345; *Nash v. Skinner*, 12 Vt. 219; *Sanford v. Norton*, 14 Vt. 228; 17 Vt. 285, s. c.; *Strong v. Riker*, 16 Vt. 554; *Sylvester v. Downer*, 20 Vt. 355.

But the courts which agree in treating the anomalous indorser as presumptively a joint-maker differ as to the nature of the presumption.

1. In Massachusetts, Minnesota, and apparently in Delaware and New Hampshire, the presumption is a conclusive presumption of law even between the original parties. Evidence, therefore, that, by the understanding of the parties, the anomalous indorser assumed the liability of a guarantor or indorser, is inadmissible. See cases *supra*, and, more particularly, *Wright v. Morse*, 9 Gray, 337; *Essex Co. v. Edmonds*, 12 Gray, 273; *Way v. Butterworth*, 108 Mass. 509; *Peckham v. Gilman*, 7 Minn. 446; *Robinson v. Bartlett*, 11 Minn. 410; *Massey v. Turner*, 2 Houst. 79; *Benton v. Willard*, 17 N. H. 593; *Sargent v. Robbins*, 19 N. H. 572.

2. In Maryland, Missouri, and apparently in Maine and Vermont, the presumption is regarded as an ordinary presumption of fact. Evidence, therefore, is admissible which shows that the anomalous indorser was in fact a guarantor or indorser. See cases *supra*, and, more particularly, *Ives v. Bosley*, 35 Md. 262; *Beidman v. Gray*, 35 Mo. 282; *Sturtevant v. Randall*, 53 Me. 149; *Sylvester v. Downer*, 20 Vt. 355.

In Arkansas, Colorado, Michigan, North Carolina, and Rhode Island, it seems not to have been decided to what degree the presumption in question can be controlled by extrinsic evidence.

3. In Ohio, South Carolina, and apparently in Texas, the presumption is a legal phenomenon, being neither a presumption of law nor a presumption of fact.

Evidence of the real nature of the transaction between the parties is admissible to charge the anomalous indorser as a guarantor. But evidence that the anomalous indorser, in truth, assumed the liability of an indorser, is inadmissible. This curious distinction is based upon the assumption that it is impossible, in the nature of things, for the payee of a note to sue an indorser. See cases *supra*, and, more particularly, *Greenough v. Smead*, 3 Oh. St. 415; *Ambler v. Hillier*, 9 Rich. 243; *Cook v. Southwick*, 9 Tex. 615.

It may be added, with reference to the cases under this class (I. a), that, if the indorsement is, in fact, made after the delivery of the note to the payee, the presumption that the party indorsing is a maker is displaced, and the indorser is liable as a guarantor. See, in addition to cases cited *supra*, *Irish v. Cutter*, 31 Me. 536; *Tenney v. Prince*, 4 Pick. 385; *Mecorney v. Stanley*, 8 Cush. 85; *Way v. Butterworth*, 108 Mass. 509; *Stagg v. Linnenfelser*, 59 Mo. 336; *Garrett v. Butler*, 2 Strob. 193.

But an indorsement, though subsequent to the delivery, will be regarded, by relation, as contemporaneous, if made in pursuance of a prior agreement. *Moies v. Bird*, 11 Mass. 436; *Hawkes v. Phillips*, 7 Gray, 284; *Leonard v. Wildes*, 36 Me. 265; *Childs v. Wyman*, 44 Me. 433; *Knapp v. Parker*, 6 Vt. 642.

b. In Louisiana, the anomalous indorser is presumptively a surety. The nature of the presumption seems not to have been yet determined. *Guidrey v. Vives*, 3 Mart. n. s. 659; *Smith v. Gorton*, 10 La. 374; *McGuire v. Bosworth*, 1 La. An. 248; *Penny v. Parham*, 1 La. An. 274; *Drew v. Robertson*, 2 La. An. 592; *Johnson v. Downs*, 3 La. An. 590; *McCausland v. Lyons*, 4 La. An. 273; *Chorn v. Merrill*, 9 La. An. 533; *Collins v. Trist*, 20 La. An. 348; *O'Leary v. Martin*, 21 La. An. 389; *Gilbert v. Cooper*, 4 Rob. (La.) 161. Conf. *Weaver v. Marvel*, 12 La. An. 517.

c. In Illinois, Kansas, Kentucky (by statute), and Nevada, the anomalous indorser is presumptively an ordinary guarantor. *Camden v. McKoy*, 4 Ill. 437; *Cushman v. Dement*, 4 Ill. 497; *Carroll v. Weld*, 13 Ill. 682; *Klein v. Currier*, 14 Ill. 237; *Webster v. Cobb*, 17 Ill. 459; *Lincoln v. Hinzey*, 51 Ill. 435; *Pahlman v. Taylor*, 75 Ill. 629. (Conf. *Bogue v. Mellick*, 25 Ill. 91; *Blatchford v. Milliken*, 35 Ill. 434.) *Firman v. Blood*, 2 Kans. 496; *Fuller v. Scott*, 8 Kans. 25; *Arnold v. Bryant*, 8 Bush, 668 (statutory); *Van Doren v. Tjader*, 1 Nev. 380.

This presumption, again, is neither a presumption of law nor a presumption of fact; evidence being admissible to charge the anomalous indorser as maker, but not to show that his liability to the payee was that of an indorser.

d. In Connecticut, the anomalous indorser is presumptively a guarantor, but with a qualified liability. In other words, he guarantees the collectibility of the note, at maturity, by the use of due diligence. *Bradly v. Phelps*, 2 Root, 325; *Beckwith v. Angell*, 6 Conn. 315; *Perkins v. Catlin*, 11 Conn. 213 (a note payable to bearer); *Clark v. Merriam*, 25 Conn. 576; *Ranson v. Sherwood*, 26 Conn. 437; *Riddle v. Stevens*, 32 Conn. 378; *Rhodes v. Seymour*, 36 Conn. 1; *Holbrook v. Camp*, 38 Conn. 23.

e. In Alabama and California, the indorser is presumptively liable to the payee as an indorser, although in California he is termed a guarantor. And this presumption is conclusive. *Milton v. De Yampert*, 3 Ala. 643; *Price v. Lavender*, 38 Ala. 389; *Riggs v. Waldo*, 2 Cal. 485; *Pierce v. Kennedy*, 5 Cal. 138; *Geiger v. Clark*, 13 Cal. 579; *Ford v. Hendricks*, 34 Cal. 673; *Jones v. Goodwin*, 39 Cal. 493.

f. In Virginia, such indorser is apparently liable as maker or guarantor at the election of the payee. *Watson v. Hurt*, 6 Gratt. 633; *Orrick v. Colston*, 7 Gratt. 189.

II. One who writes his name upon the back of a negotiable note before it is indorsed by the payee is presumed in the following States to assume no liability to the payee, but to occupy the position of an ordinary second indorser with all the rights and only the obligations incident thereto: Georgia, Indiana, Iowa, Kentucky (prior to statute), Mississippi, New York, Oregon, Pennsylvania, Tennessee, and Wisconsin. *Collins v. Everett*, 4 Ga. 266. (Conf. *Quin v. Sterne*, 26 Ga. 223, — a note payable to bearer.) *Wells v. Jackson*, 6 Blackf. 40; *Earle v. Foster*, 7 Blackf. 35; *Harris v. Pierce*, 6 Ind. 162; *Cecil v. Mix*, 6 Ind. 478; *Sill v. Leslie*, 16 Ind. 236; *Drake v. Markle*, 21 Ind. 433; *Dale v. Moffit*, 22 Ind. 113; *Ewing v. Logan*, 40 Ind. 342; *Fear v. Dunlap*, 1 Greene, 331. (Conf. *Brenner v. Gundershiemer*, 14 Iowa, 82.) *Needhams v. Page*, 3 B. Mon. 465; *Kellogg v. Dunn*, 2 Met. (Ky.) 215; *Levi v. Mendell*, 1 Duv. 77; *Thomas v. Jennings*, 13 Miss. 627; *Jennings v. Thomas*, 21 Miss. 617; *Herrick v. Carman*, 12 Johns. 159; *Tillman v. Wheeler*, 17 Johns. 326; *Dean v. Hall*, 17 Wend. 214 (a note payable to bearer); *Seabury v. Hungerford*, 2 Hill, 80 (a note payable to bearer); *Gilmore v. Spies*, 1 Barb. 158; *Spies v. Gilmore*, 1 Comst. 321; *Ellis v. Brown*, 6 Barb. 282; *Bradford v. Martin*, 3 Sandf. 647; *Hahn v. Hull*, 4 E. D. Sm. 664; *Cottrell v. Conklin*, 4 Duer

45; *Waterbury v. Sinclair*, 16 How. Pr. 329; 26 Barb. 455, s. c.; *Lester v. Paine*, 39 Barb. 616; *Bacon v. Burnham*, 37 N. Y. 614; *Phelps v. Vischer*, 50 N. Y. 69; *Clothier v. Adriance*, 51 N. Y. 322; *Hull v. Marvin*, 2 Th. & C. 420; *Woodruff v. Leonard*, 4 Th. & C. 208; 1 Hun, 632, s. c.; *Weld v. Bowers*, 9 Daily Reg. 921; *Kamm v. Holland*, 2 Oreg. 59; *Cogswell v. Hayden*, 5 Oreg. 22; *Taylor v. McCune*, 11 Pa. 460; *Kyner v. Shower*, 13 Pa. 444; *Schollenberger v. Nehf*, 28 Pa. 189; *Fegenbush v. Lang*, 28 Pa. 193; *Barto v. Schmeck*, 28 Pa. 447; *Guldin v. Linderman*, 34 Pa. 58; *Smith v. Kessler*, 44 Pa. 142; *Schenk v. Robeson*, 2 Grant, 372; *Schafer v. Farmer's Bank*, 59 Pa. 144; *Slack v. Kirk*, 67 Pa. 380; *Eilbert v. Finkbeiner*, 68 Pa. 243; *Comparree v. Brockway*, 11 Humph. 355; *Clouston v. Barbieri*, 4 Sneed, 336; *Heath v. Van Cott*, 9 Wis. 516; *Cady v. Shepard*, 12 Wis. 639; *Davis v. Barron*, 13 Wis. 227; *King v. Ritchie*, 18 Wis. 554. See also *Offutt v. Hall*, 1 Cranch, C. C. 504, 572; *McComber v. Clarke*, 3 Cranch, C. C. 6.

This presumption, however, is a presumption of fact merely, and evidence is accordingly admissible to show that, by the understanding of the parties, the anomalous indorser was to assume a liability to the payee. See cases cited *supra*. But see *Collins v. Everett*, 4 Ga. 266, *contra*.

This presumption being rebutted, the nature of the indorser's liability to the payee varies in different jurisdictions.

(1.) In New York, Oregon, Tennessee, and Wisconsin, he is presumptively liable as indorser, the payee, in legal contemplation, bringing his action not as payee, but as second indorsee, and having first indorsed "without recourse." And it would seem that the presumption is conclusive.

(2.) In Indiana, Iowa, Mississippi, and Pennsylvania, evidence is admissible to charge the indorser as maker or guarantor. Whether he could also be charged as indorser by the payee seems not to have been determined. But see, with reference to the Statute of Frauds, *Drake v. Markle*, 21 Ind. 433; *Schafer v. Farmer's Bank*, 59 Pa. 144.

III. In New Jersey, the blank signature of an anomalous indorser gives rise to no presumption whatever. The party will be charged according to the evidence. *Crozer v. Chambers*, *Spencer*, 256; *Chaddock v. Vanness*, 35 N. J. 517. See also *Rey v. Simpson*, 22 How. 341.

IV. The indorsement by a stranger of a non-negotiable note has also produced much controversy. In Connecticut, Louisiana, Massachusetts, Michigan, Missouri, Ohio, South Carolina, Texas, Virginia, and apparently in Vermont, the liability of the indorser is presumptively the same as it would be if the note were negotiable. *Huntingdon v. Harvey*, 4 Conn. 124; *Welton v. Scott*, 4 Conn. 527; *Castle v. Candlee*, 16 Conn. 223; *Holbrook v. Camp*, 38 Conn. 23, 24; *Cooley v. Lawrence*, 4 Mart. 639; *Joselyn v. Ames*, 3 Mass. 274; *Wetherwax v. Paine*, 2 Mich. 555; *Lewis v. Harvey*, 18 Mo. 74; *Parker v. Riddle*, 11 Oh. 102; *Cockrell v. Milling*, 1 Strob. 444. (Conf. *Tucker v. English*, 2 Speers, 673.) *Cook v. Southwick*, 9 Tex. 615; *Carr v. Rowland*, 14 Tex. 275; *Orrick v. Colston*, 7 Gratt. 189; *Barrows v. Lane*, 5 Vt. 161. In Alabama, the indorsement is equal to a guarantee of collectibility with due diligence. *Jordan v. Garnett*, 3 Ala. 610; *Nesbit v. Bradford*, 6 Ala. 746; *Tankersley v. Graham*, 8 Ala. 247. In New York, Pennsylvania, and Wisconsin, the indorser is a maker or guarantor according to the fact. *Griswold v. Slocum*, 10 Barb. 402; *Richards v. Warring*, 1 Keyes, 576; 39 Barb. 42, s. c.; *Leech v. Hill*, 4 Watts, 448; *Houghton v. Ely*, 26 Wis. 181; *Gorman v. Ketchum*, 33 Wis. 427. See further as to non-negotiable notes, *Fear v. Dunlap*, 1 Greene, 331, 334; *Crawford v. Lytle*, 70 N. Ca. 385.

SECTION IV.

An Indorsement is complete only upon Delivery.

BRIND v. HAMPSHIRE.

IN THE EXCHEQUER, MAY 2, 1836.

[*Reported in 1 Meeson & Welsby, 365.*]

TROVER for a foreign bill of exchange, drawn at Honduras, dated 28th August, 1835, purporting to be drawn by Hyde & Forbes, upon and accepted by Hyde & Co.; being for the payment to William Usher, Esq., or order, of £300 sterling, at ninety days' sight, and purporting to be indorsed by the said William Usher to the order of Mrs. Frances Brind.

Plea:¹ that the defendant received the bill of exchange from W. U. to hand over to plaintiff's wife, and before he could do so, and without any negligence or improper delay on his part, or before the plaintiff had obtained the possession of it, the said W. U. countermanded and revoked the direction, and directed the defendant to keep it in his hands, and not to hand or deliver it over to the plaintiff's wife, and that he kept it in obedience to that direction.

Replication: that, before the defendant had received the bill, it was indorsed by the said W. U. to the plaintiff's wife, which indorsement still remained upon it; that the defendant presented the bill for acceptance, and procured the acceptance by the drawers, and held it for the plaintiff for that purpose, and before the countermand gave notice to Mrs. Brind that he had received the bill for the purpose aforesaid, and desired to be informed when and how the same should be delivered, and undertook and promised that such information should be attended to, and requested the plaintiff to pay him the expenses of conveying the notice to Mrs. Brind, which the plaintiff did before the countermand.

Rejoinder: that the bill remains in the hands of the defendant as the agent of W. U., who revoked the direction, as stated in the plea; that Mrs. Brind kept a school, at which W. U.'s children were lodged and educated; in respect whereof she had rendered accounts to W. U., by which it appeared that he was indebted to her in a large sum of money, and that he had remitted the bill for the purposes mentioned

¹ For the sake of brevity, the statement of the pleadings given in 5 L. J. Ex. 197, has been substituted for the statement in the original report.—ED.

in the plea, before he could examine the accounts; but, being resident at Belize, in Honduras, he had, before the defendant could deliver the bill to Mrs. Brind, directed him to keep it, and to have a fair scrutiny into the accounts, and to pay her what might be due to her: wherefore, being still the agent of W. U., he detains the bill according to those directions; and, as to the notice in the replication, that that was a letter sent by him to Mrs. Brind, informing her that he had a commission to pay her money on account of W. U.'s children, which was sent through the general post; and he concluded that he had had no fair scrutiny nor fair investigation of the accounts.

Surrejoinder: That the countermand was not first received until after defendant had caused the bill to be accepted, and had given notice to Mrs. Brind, as mentioned in the replication; and the plaintiff had paid the expense of conveying the notice. Conclusion to the country.

Special demurrer.

Hoggins, in support of the demurrer, having stated the pleadings, and referred to *Williams v. Everett*,¹ was stopped by the court.

Barstow, contra. The principle established in *Williams v. Everett* is not precisely applicable to this case. That was an action for money had and received; this is an action specifically to recover a bill, which has been indorsed over so as to pass the right in it to the plaintiff. [PARKE, B. Rather, which was intended to be indorsed: there was no delivery to the indorsee.] That is not necessary in the case of a special indorsement to a particular party. In an action on the bill, it would not have been necessary to aver delivery to the plaintiff. [PARKE, B. No: because it is implied in the allegation of indorsement. LORD ABINGER, C. B. Suppose Usher had indorsed the bill, and kept it in his own possession, would the plaintiff have any property in it? If not, then is not the defendant merely Usher's agent?] It is not competent to the defendant to say he did not hold the bill for the person to whom it was to be handed over according to the directions he received; particularly after having left it for acceptance with such indorsement upon it. The acceptance, under such circumstances, created a contract between the defendant and the special indorsee, to pay to her according to the indorsement. [PARKE, B. The acceptance admits nothing but the drawing; it admits no indorsement: the acceptor may be presumed not to look at any indorsement till he is called on to pay the bill.] There are authorities to show that the drawee is bound to look to the indorsement, where it is a restricted one. [LORD ABINGER, C. B. Yes, when he pays the

¹ 14 East, 582.

money, not when he accepts the bill. You must argue that, if the drawer himself took the bill for acceptance, he could not the next day renounce his intention of paying it over to the party whose name he had indorsed on it.] There was also notice given to the plaintiff: after that, the authority was irrevocable. There are authorities, too, to show that an authority given on good consideration is irrevocable: here, it appears on the pleadings that there was a debt due to Mrs. Brind, though the state of the account is disputed. Some expense also was incurred by the plaintiff, in consequence of the notice. The combination of all these facts gives the plaintiff a title to the possession of the bill.

LORD ABINGER, C. B. It seems to me that the case is exactly the same as if Usher had himself carried the bill for acceptance, having first indorsed it to the plaintiff. If no action of trover could have been maintained against him in such case, neither can it against the defendant. There is nothing disclosed to show any change in the character of the defendant's agency; it does not appear that he has contracted any new relation with the plaintiff, so as to alter his character as agent of Usher. It is, in fact, just the same thing as if Usher had sent a servant with the bill to the indorsee, and, instead of delivering it, he had brought it back. Could not Usher then have said: "Give it me. I will not pay it over now?" It is not because the agent has not done precisely what the principal desired him to do, that the property is changed.

PARKE, B. I am of the same opinion. I see nothing whatever which would transfer the property from Usher to the plaintiff. With regard to the communication made by the defendant to the plaintiff, even supposing it to have been that he held the bill itself for his use, that would not have the effect of transferring the property. The direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel or money to the remittee or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former. That was the doctrine laid down in *Williams v. Everett* and *Scott v. Porcher*.¹ Now it is clear that this bill was not handed over: then is any thing disclosed to show a binding obligation as between the defendant and the plaintiff? I am clearly of opinion that there is not. The utmost effect that can be given to the notice referred to is that the defendant states that he has received the bill for the use of the plaintiff; but there is no contract by him to hold it as agent for the plaintiff for any new consideration, nor any assent

¹ 3 Meriv. 652.

by the plaintiff to the defendant's holding it as his agent. There is nothing whatever to show that the plaintiff could not still sue Usher on the original consideration, and require the money to be paid to him *instantly*. Nothing whatever has passed to alter the relation of the parties, — nothing more than an inchoate contract, if I may so say, by which the defendant promises to hold the bill for the plaintiff, in case the plaintiff assents so as to receive payment.

BOLLAND, B. I am of the same opinion. Although *Williams v. Everett* was an action in a different form, I think the same principle which was laid down in that case ought to govern the present, and that there is nothing shown to alter the property in this bill. The only question is, whether there is any thing to differ the case from *Williams v. Everett* in what has been done between the party to whom, and the party for whose use, the bill was remitted. The principle on which that case was put was, as stated by Lord Ellenborough,¹ that the remittees "may hold the bill till received, and its amount when received, for the use of the remitter himself, until, by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. But, instead of that, what is done here? There is, certainly, the letter of the defendant, agreeing to hold for the plaintiff; but there is no assent of the plaintiff to receive it as payment: it is only an inchoate offer, on the part of the agent, to hold the bill for the remittee, if he assents. I find no such appropriation here as is referred to by Lord Ellenborough.

ALDERSON, B., concurred.

*Judgment for the defendant.*²

ADAMS v. JONES.

IN THE QUEEN'S BENCH, JUNE 20, 1840.

[Reported in 12 *Adolphus & Ellis*, 455.]

ASSUMPSIT by indorsee against acceptor of a bill of exchange drawn by one John Foulkes on, and accepted by, defendant, and by the said Foulkes indorsed to the plaintiff.

¹ 14 East, 596.

² *King v. Lambton*, 5 Price, 428; *Sainsbury v. Parkinson*, 18 L. T. 198, 227; 7 H. & N. 692, n., s. c.; *Emmett v. Tottenham*, 8 Ex. 884; *May v. Cassiday*, 7 Ark. 376; *Bizzell v. State Bank*, 8 Ark. 459; *Kirkpatrick v. Wolfe*, 17 Ark. 96; *Dann v. Norris*, 24 Conn. 333; *Pardoe v. Lindley*, 31 Ill. 174; *Richards v. Darst*, 51 Ill. 140; *Higgins v. Bullock*, 66 Ill. 37; *Chester Co. v. Lickiss*, 72 Ill. 521; *Talbot v. Rochester Bank*, 1 Hill, 295; *Nelson v. Nelson*, 6 Ired. Eq. 409, *accord*.

Conf. Lysaght v. Bryant, 9 C. B. 46.

Plea: that the said bill of exchange was accepted by defendant for and on account of moneys due from defendant to the said John Foulkes, in respect of the sale by Foulkes to defendant of a share of a lease then held by the said Foulkes, for digging and getting lead ore from a certain mine, &c., which said lease had theretofore been sold and assigned to Foulkes by one Edward Roberts, to whom it had been granted; that, at the time of accepting the said bill, there was due from Foulkes to Roberts, on account of the said sale and assignment, a large sum, exceeding the amount of the bill of exchange, to wit, &c.; and that defendant accepted and delivered the said bill to Foulkes, who received the same on account of the sum so due from defendant to him, and upon no other consideration; and that Foulkes then indorsed the said bill in blank, and delivered the same to plaintiff as the agent of Roberts, and for the purpose and on the terms that plaintiff should deliver the same to Roberts for and on account of a part of the moneys then due from Foulkes to Roberts in respect of the said sale and assignment; and plaintiff then took and received the said bill, and from thence held and still holds the same as the agent only of the said Roberts, and for the purpose and upon the terms aforesaid, and without having given any value or consideration for the same; that plaintiff did not, nor would at any time, deliver the said bill to Roberts; but, on the contrary, in breach and violation of his duty as such agent, and in fraud of Roberts, wrongfully and without the consent of Roberts, kept and retained the said bill to his own use and benefit. Averment: that Roberts, before and at the commencement of the suit, claimed and still claims to be entitled to the said bill and to the money therein mentioned, and dissented and still dissents from the plaintiff suing for and recovering the same in his own name; and has required defendant not to pay the same or any part thereof to the plaintiff. Verification.

Replication, *de injuria* generally, &c., on which issue was joined.

On the trial before Williams, J., at the Flintshire spring assizes, 1839, a verdict was found for the defendant.

In the following term, *Jervis* obtained a rule *nisi* for judgment for the plaintiff, *non obstante veredicto*, on the ground that the plea disclosed no defence to the action.

Crompton now showed cause.¹ The plea shows that the plaintiff had no title to sue. He holds the bill only as servant of Roberts, the real indorsee, whose property he has embezzled. The plea states that Roberts dissents from the action, and has required payment to himself; so that the defendant cannot show payment to the plaintiff in

¹ Before LORD DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, JJ.

discharge of his liability to Roberts. It is true that the plea might probably have been held bad on special demurrer, as amounting to an argumentative traverse of the indorsement; but that is no objection now. To allow the plaintiff to recover will be extending the privilege of the holders of bills further than the law-merchant warrants. The plaintiff is a *mala fide* holder, without consideration and without authority from the *bona fide* holder. He seeks to enforce a right of action *ex turpi causa*. Treuttel v. Barandon¹ shows that indorsement to an agent, for the special use of a third person, will not give the agent any disposing power over a bill for his own purposes. Here, too, the indorsement was not specially to the plaintiff. If the defendant were to pay the amount and obtain possession of the bill, Roberts might sue the defendant in trover. The mere production of a bill, though indorsed in blank, will not entitle a person to sue on it who chooses to call himself the indorsee, where the evidence shows that there was no delivery to him as such. Machell v. Kinnear.²

Welsby, contra. The plea does not show that the plaintiff originally obtained the bill by any fraud, nor does it state that the plaintiff had no authority to sue for or to receive the money. What is it to the acceptor that Roberts may be entitled to the money as between him and the plaintiff? The plaintiff will become a trustee for Roberts, but as between Roberts and the defendant payment to the plaintiff will be a discharge. Noel v. Rich³ is an authority. There the indorsee, by delivery of a prior holder, to whom the drawer had given a bill for the purpose of getting it discounted, was held entitled to recover against the drawer, though he had notice of the breach of faith.

Cur. adv. vult.

On a subsequent day of these sittings (June 24th) the judgment of the court was delivered by

LORD DENMAN, C. J. This was an action by the indorsee against the acceptor of a bill of exchange. The plea was as follows. [His Lordship read the plea.]

The replication was *de injuria*. A verdict was found for the defendant. Afterwards a rule *nisi* was obtained to enter judgment for the plaintiff, *non obstante veredicto*. The plea does not admit an indorsement from Foulkes to the plaintiff, and might possibly be bad, on special demurrer, for that reason. It states that Foulkes, the payee, indorsed the bill in blank, and delivered it to the plaintiff as agent for one Roberts, for the purpose that the plaintiff should deliver it to Roberts in part payment of a debt due from Foulkes to Roberts, and that the plaintiff gave no consideration for it. The declaration avers

¹ 8 Taunt. 100.

² 1 Star. N. P. C. 499.

³ 2 C. M. & R. 360.

that Foulkes indorsed the bill to the plaintiff. Now, a bill may be indorsed to a party in two ways, — either by a special indorsement, making it payable to that party, or by a blank indorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party as indorsee, in order to constitute an indorsement to him. But this plea avers that the bill was indorsed in blank, and delivered to the plaintiff, not as indorsee, but as agent only for another to whom he was to deliver it, and who was the real indorsee. We think, therefore, that it is a constructive denial that the bill was indorsed to the plaintiff, and that it is good in the present stage of proceedings, however open it may have been to a special demurrer. A judgment *non obstante veredicto* is always upon the merits, and never granted but in a very clear case, — where it is apparent that, in any way of putting the case, the defendant can have no merits.

Such is not the case here. The plea is substantially good, and the rule must be discharged. *Rule discharged.*



CHARLES MARSTON v. ALLEN.

IN THE EXCHEQUER, MAY 22, 1841.

[Reported in 8 Meeson & Welsby, 494.]

ASSUMPSIT on a bill of exchange for £100, drawn by one John Harrop upon and accepted by the defendant, payable two months after date to his own order; and the declaration averred that the said John Harrop then indorsed the same to one Edward Marston, and the said Edward Marston then indorsed it to the plaintiff.

Pleas: first, that the defendant did not accept the bill; secondly, that the said John Harrop did not indorse the said bill of exchange to the said Edward Marston; thirdly, that Edward Marston did not indorse the bill to the plaintiff. Issue thereon.

At the trial before Rolfe, B., at the Middlesex sittings after last Hilary term, Harrop, the drawer of the bill, was called; and he proved that the name John Harrop, on the back of the bill, was in his own handwriting. He stated, on cross-examination, that he was the accountant to the Imperial Bank, and that he had received the bill in question as an officer of the bank for a debt due to the bank; that, after writing his name upon the bill, he had delivered it to a person named William Marston, also employed in the bank, to be kept by him in safe custody for the bank, whose property it was. Edward Marston

was then called ; and he proved that he had received the bill from William Marston, as he stated, for value, and that he had indorsed and delivered it for value to the plaintiff, who was his father. The counsel for the defendant, in answer to this evidence, proposed to show that both Edward Marston and the plaintiff received the bill with full knowledge of the fraud committed by William Marston, in handing over the bill to them. The learned judge, however, was of opinion that the evidence was inadmissible under the plea denying Harrop's indorsement, and rejected it accordingly ; and the plaintiff obtained a verdict. *E. V. Williams* having, in Hilary term last, obtained a rule to show cause why there should not be a new trial, on the ground that this evidence was improperly rejected,

W. H. Watson showed cause in Easter term (April 23). The question in this case arises on the simple issue whether Harrop indorsed the bill to Edward Marston. The evidence tendered was that the indorsement was obtained under circumstances of fraud, of which the indorsee was cognizant at the time. But the only question to be tried on this issue was whether Harrop had in point of fact indorsed the bill ; and, therefore, that evidence was inadmissible, and was properly rejected at the trial. The rule of H. T., 4 Will. IV., R. I., § 3, is that, "in every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." According to that rule, when the indorsement is obtained by fraud, it must be answered by a special plea ; and that is the very defence attempted to be set up in the present case. It is not open to the defendant to set up that defence under these pleadings. [ALDERSON, B. The giving the bill to the party for safe custody is not an indorsement. By so doing, the other does not indorse it to him. If I indorse a bill, and it is stolen from me, is it not enough for me to say, I did not indorse it for the purpose of passing it?] No doubt it is a good defence, if the party took it with a knowledge of the circumstances ; but such a defence must be pleaded specially. [ALDERSON, B. Is it an indorsement? Is not the meaning of "indorsed" "transferred by indorsement"?) No: the writing is the indorsement in fact ; the circumstances under which it is made are extrinsic. The effect of allowing such a defence to be set up under this plea would be a direct violation of the new rules ; and parties must come in every case prepared to prove the circumstances under which the bill passed, and the consideration which the holder gave for the bill. The words of the rule seem to refer to an indorsement in fact, but which is void on the ground of fraud, and that is the defence in the present

case ; that, although Harrop indorsed his name upon the bill, such indorsement was void on the ground of fraud. The defendant cannot set it up as a limited or restricted indorsement ; for a limited indorsement must be expressed to be so on the face of the bill ; and, when it is so indorsed, it does not affect third parties, unless the terms are complied with. *Sigourney v. Lloyd*, *Edie v. The East India Company*. And *Mr. Roscoe*, in observing on those cases, says :¹ “ So, in France. the holder may, by a restrictive indorsement, prevent the indorsee from transferring the bill.” What, by the law of merchants, is an indorsement ? It is the writing the name on the bill. [ALDERSON, B. For any purpose which is to be carried into effect by a transfer of the bill.] This may be a defence ; but it should be set forth on the record. [ALDERSON, B. Would not that be putting something on the record which was contradictory ?] If the law be as is contended for on the other side, parties must come to trial prepared to prove every fact attending the indorsement. The meaning of the rule is that the indorsement, as respects third parties, is the handwriting on the bill ; though not so as respects the immediate parties to it, as in the case of an accommodation bill. But, when a bill is in the hands of a third party, fraud must be shown in order to defeat his title, and that must be pleaded. In *Adams v. Jones*, where, to a declaration against the acceptor of a bill of exchange indorsed by the drawer to the plaintiff, the defendant pleaded that he accepted it on account of a debt due from him to the drawer ; that the drawer indorsed it in blank, and delivered it to the plaintiff as agent for one Roberts, for the purpose that the plaintiff should deliver it to Roberts, in payment of a debt due from the drawer to Roberts ; that the plaintiff gave no consideration for it, and wrongfully retained it in breach of his duty as Roberts’s agent ; that Roberts claimed to be entitled, and dissented from the plaintiff’s suing, — it was held that the plea amounted to a constructive denial of the alleged indorsement to the plaintiff, and was therefore good after verdict. The court, however, expressed a doubt whether the plea would have been good on special demurrer. [ALDERSON, B. What the defendant will probably contend is, that if these facts were extended on the record, they would not show any thing amounting to an indorsement.] It would clearly be an indorsement in the hands of a *bona fide* holder. In the notes to *Jervis’s Rules*, p. 128, it is said, in referring to the cases decided with reference to the rule H. T., 4 Will. IV., R. I., § 3 : “ If the defence be that the bill or note was drawn, indorsed, or accepted by way of accommodation, or that it was obtained by fraud, or under

¹ *Roscoe on Bills*, 887

any circumstances which disentitle the plaintiff to sue upon it, this defence must be pleaded specially." Now, this defence being that the bill was obtained under circumstances of fraud, it ought, therefore, to have been pleaded that the principles of the rules may be carried out.

E. V. Williams, contra. At the common law, this would have been the only proper plea; and the new rules do not affect that mode of pleading. If the circumstances had been pleaded specially, the plea would have been bad as amounting to an argumentative denial of the indorsement. Perhaps this defence might have been pleaded by giving express color; but a party is never bound to give express color. As to the argument of the hardship upon the plaintiff by being called upon by surprise at the trial to meet such a defence, if the party is not a *bona fide* holder, he must know it. The rule as to pleading matters specially is not so general as has been contended. It has been decided, since the new rules, that, in trover by the assignee of a bankrupt, a plea that the plaintiff is not assignee puts in issue the petitioning creditor's debt and the act of bankruptcy. *Butler v. Hapson*.¹ So, also, pleas that the plaintiffs are not assignees, and were not possessed as assignees, have been held to put in issue the trading, the petitioning creditor's debt, and the act of bankruptcy. *Buckton v. Frost*.² So, in *Nicolls v. Bastard*,³ it was held that the plea of no property in the plaintiff means no property as against the defendant. And in *Ashby v. Minett*,⁴ where, in trespass for taking the plaintiff's goods, the defendant pleaded that the goods were not the plaintiff's, the plaintiff proved that the sheriff had seized goods, the property of B., under an execution against B., and had sold them to him, the plaintiff, — it was held that the defendant might show, on the issue joined, that the sale was fraudulent as against creditors; that he himself had taken the goods under an execution against B., and that this was the alleged trespass. He also cited *Carnaby v. Welby*.⁵ What is the meaning of the averment in the declaration that Harrop indorsed the bill to Edward Marston? It is that he *indorsed and delivered* it. The traverse in the plea, therefore, is not merely of the fact that Harrop wrote his name on the back of the bill, but that he transferred it by delivery. It is not necessary, in a declaration on a bill, to state the delivery of it; that is included in the allegation that the defendant accepted it, as was decided in *Churchill v. Gardiner*⁶ and *Smith v. McClure*;⁷ and, in the former case, the court said: "If the maker did

¹ 4 Bing. N. C. 290; 5 Scott, 798.

² 8 Ad. & Ell. 844; 1 P. & D. 102.

³ 2 C., M., & R. 659.

⁴ 8 Ad. & Ell. 121; 1 Nev. & P. 231.

⁵ 8 Ad. & Ell. 872; 1 P. & D. 98.

⁶ 7 T. R. 596.

⁷ 5 East, 476.

not intend to put the bill into circulation when he made it, it would be open to the defendant to make that defence on the plea of the general issue." In *Cox v. Troy*, where the defendant, having once written his acceptance with the intention of accepting a bill, afterwards changed his mind, and, before it was communicated to the holder, or the bill delivered back to him, obliterated his acceptance, it was held that he was not bound as acceptor. That shows that "indorsement" does not mean merely the putting the name on the bill. *Brind v. Hampshire* is another authority to show that the meaning of an indorsement is not the mere writing on the bill, but a delivery over to the indorsee. Suppose I give a bill to a person to carry to the bank for me, and he sues me upon it, would it be necessary for me to plead that I did not mean to give him any property in it? Would it not be enough to say, I did not indorse it to him? In *Thompson v. Giles*,¹ a customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit to the full amount; and he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him from the time when they were due and paid, and had credit on interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favor of the customer at the time of the bankruptcy. There it was held that the property in the bills did not pass. In *Goggerly v. Cuthbert*,² where a bill was drawn by one P. in favor of the plaintiff, who, having got it accepted, indorsed it to himself, and put it into the hands of D., for the purpose of getting it negotiated, and raising money upon it for his (the plaintiff's) benefit; but D., instead of getting it discounted, gave it to his brother, from whom it came into the hands of the defendant two years after it became due, it was held that the plaintiff was entitled to recover back the bill from the defendant in trover; that the delivery of the bill not being absolute, but conditional, was in the nature of an escrow. So, in *Cranch v. White*,³ where R., being employed to procure a bill of exchange to be discounted for the plaintiff, instead of doing so indorsed it, and placed it in the hands of the defendant, who was clerk to a creditor of R., and who carried the bill to R.'s account with his creditor, and

¹ 2 B. & Cr. 422.² 2 New Rep. 170³ 1 Bing. N. C. 414.

afterwards, though apprised of the circumstances under which R. held the bill, refused to restore it, it was held that the plaintiff was entitled to recover in trover. If this action had been brought by William Marston, who claimed the bill from Harrop, it would not have been necessary to plead that there was no indorsement to him. Then does it make any difference that the person who obtained it fraudulently from him had fraudulently transferred it? Where there is a *bona fide* holder, who has paid value for the bill, the parties to the bill are estopped from disputing his title; but, as soon as you show that he has notice of the fraud, the estoppel is at an end: it becomes then a mere matter of fact. Although a party may plead an estoppel by deed, he cannot plead an estoppel *in pais*, because that will immediately show that he is pleading matter of evidence. In *Hazard v. Treadwell*,¹ where the defendant, being known to a tradesman, sent a person to him for goods on trust, and afterwards paid for them, and a second time sent the same person with ready money, who received the goods, but did not pay for them, it was held that the master was estopped from disputing that he had authority to order the goods; as, by sending him for goods on trust the first time, and paying for them, he had given him credit, so as to charge himself upon the second contract. But, if the plaintiff had shown that the tradesman had notice of this, he would not be liable. Such a defence could not, however, be pleaded specially, as it would be matter of evidence. Where a bill is drawn by one partner in fraud of his copartners, they are estopped from saying that it is not their bill, unless they can show that the bill was so drawn to the knowledge of the party in whose favor the bill was drawn; but such a defence could not be pleaded. *Adams v. Jones*, if not extra-judicial, is precisely in point. *Cur. adv. vult.*

The judgment of the court was now delivered by

ALDERSON, B. This was a case tried at the Westminster sittings in last Hilary term, before my brother *Rolfe*, and was argued in the last term before my brothers *Gurney* and *Rolfe* and myself. The declaration was upon a bill of exchange, drawn by John Harrop upon and accepted by the defendant, and indorsed by John Harrop to Edward Marston, and by Edward Marston to the plaintiff.

The only plea to which it will be necessary to refer was the second, by which the defendant denied the indorsement by John Harrop to Edward Marston.

At the trial, the plaintiff called John Harrop, who proved that the name John Harrop, written on the back of the bill, was written by

¹ 1 Stra. 506.

himself. He stated, on cross-examination, that he was the accountant to the Imperial Bank, and that he had received the bill as an officer of the bank for a debt due to the bank, and had, after writing his name thereon, delivered it to another person of the name of William Marston, also employed in the bank, to be kept by him in safe custody for the bank, to whom it belonged. Edward Marston then was called; and it appeared that he had received the bill from William Marston, as he said, for value, and that he had indorsed and delivered it for value to his father, the plaintiff.

On the part of the defendant, however, it was proposed to controvert this, and to show that both Edward Marston and the plaintiff, his father, received the bill with full knowledge of the fraud committed by William Marston, in handing over the bill to them, contrary to his duty to the bank.

My learned brother rejected this evidence, as inadmissible under the plea denying Harrop's indorsement; and the question is, whether, in so doing, he was right.

On the argument, it was very strongly urged by *Mr. Watson* that, to admit this evidence, would be contrary to the new rules of pleading. But it appears to us that the new rules of pleading have really nothing to do with this question. The only point for us to consider is this: what, in point of law, is the indorsement of the bill denied by the plea on this record? We have to decide whether, if the facts opened by the defendant had been fully proved, my learned brother ought to have directed the jury that this bill had not been indorsed by John Harrop. If the indorsement denied by this plea simply means the writing the name of John Harrop on the back of the bill, the plaintiff is right; for these facts have no tendency to disprove that proposition: or, if it means such an act of writing on the bill, followed by the bill being afterwards, *under any circumstances*, in the hands of a holder, then also the verdict ought not to be disturbed. But we think neither of these propositions can be sustained in point of law.

The law as laid down by the Court of Queen's Bench, in the case of *Adams v. Jones*, after time taken to consider the question, seems very strongly applicable to this case. Lord Denman there describes an indorsement thus: "A bill may be indorsed in two ways, — either by a special indorsement making it payable to a given person, or by a blank indorsement and delivery to him. In the latter way, at all events, if not in the former, the bill must be delivered to the party as indorsee; but this plea," he adds, "averts that it was indorsed in blank and delivered to the plaintiff, not as indorsee, but as agent only for another, to whom he was to deliver it, and who was the real in-

dorsee. We think, therefore, that it was a constructive denial that the bill was indorsed to the plaintiff." And, in *Brind v. Hampshire*, this court came to the same conclusion; both Lord Abinger and Mr. Baron Parke holding, in that case, that a delivery to the indorsee is necessary to complete an indorsement, by which those learned judges clearly mean a transfer by indorsement. Again: Mr. Justice Bayley, in his book on Bills of Exchange, expresses himself very clearly to the same effect. "Bills and notes are assigned," he says, "either by delivery only or by indorsement and delivery." And, immediately after this passage, he adds: "On a transfer by delivery only, without indorsement, the person making it ceases to be a party to the bill or note. On a transfer by indorsement, he is, according to the legal operation, a new drawer."¹ Then, what is the meaning of the plea, "did not indorse," in this case? In order to ascertain this, we ought to look at the declaration; for this is only a traverse of one of the averments therein. Now, the declaration, after setting out the making and accepting of the bill, adds that the drawer indorsed it to Edward Marston, and that Edward Marston indorsed it to the plaintiff. But these averments, introduced into the declaration for the purpose of tracing the plaintiff's title to sue, must necessarily mean that the drawer transferred the bill by indorsement to Edward Marston, and that Edward Marston transferred the bill by indorsement to the plaintiff. The plea, therefore, must have the same construction, and must be taken to mean a denial of that transfer by indorsement stated in the declaration. If, then, a transfer by indorsement, as we have before shown, consists in an indorsement (or writing the name of the party transferring the bill on the bill) and a delivery for the purpose of completing such transfer, it will follow that the issue "did not indorse" involves both these propositions.

But then we were pressed in argument with the difficulty that here there has been a delivery to the plaintiff, and one for the admitted purpose of transferring the bill; and no doubt, if such delivery had been *bona fide* and for value, it would have been quite sufficient to give a title to the plaintiff.² The law-merchant, for the purposes of currency, and the advantages flowing from an unchecked circulation of bills of exchange, no doubt provides that a *bona fide* holder for value shall not be affected by an intermediate fraud. We do not, indeed, adopt the proposition that the previous party to the bill is estopped from setting up the defence of fraud against the case of a *bona fide* holder for value. We think it better to say that, by the law-

¹ Page 98, 4th ed.

² *Hayes v. Caulfield*, 5 Q. B. 81; *Lloyd v. Howard*, 15 Q. B. 995; *Barber v. Richards*, 6 Ex. 68, *accord.* — ED.

merchant, every person having possession of a bill has (notwithstanding any fraud on his part, either in acquiring or transferring it) full authority to transfer such bill, but with this limitation : that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such bill *bona fide* and for value, and who is either himself the holder of it or a person through whom the holder claims. Any thing, therefore, which shows that this restriction applies shows that the party making the transfer had no authority, and that the transfer is not valid. In this case, if the evidence rejected had been received, and the jury had thereby been satisfied that this bill was delivered, after John Harrop's writing his name thereon, to William Marston for a special purpose ; that William Marston delivered it, in fraud of such purpose, to Edward Marston, and that Edward Marston, at the time of such delivery, was fully aware that in so doing William Marston committed a fraud, we think that they ought to have found a verdict for the defendant, on the issue that John Harrop did not indorse the bill (*i. e.* did not transfer the bill by indorsement) to Edward Marston. For, although there was an indorsement, there was no valid delivery by Harrop, or by any authority from him ; and so no complete transfer by indorsement of the bill to Edward Marston.

For these reasons, we are of opinion that the evidence tendered ought to have been received, and that there must be a new trial.

Rule absolute for a new trial.



BELL, PUBLIC OFFICER, &C., OF THE NEWCASTLE-UPON-TYNE JOINT STOCK BANKING COMPANY, v. VISCOUNT INGESTRE.

IN THE QUEEN'S BENCH, MAY 29, 1848.

[*Reported in 12 Queen's Bench Reports, 317.*]

ASSUMPSIT upon two bills of exchange drawn by one Edwards, — the one for £2,000, the other for £2,118 10s., — accepted by defendant, and by Edwards indorsed to the Newcastle-upon-Tyne Joint Stock Banking Company. Pleas (among others), traversing the indorsements respectively.

On the trial before Wightman, J., at the Liverpool summer assizes, 1847, the plaintiff proved Edwards's handwriting to the indorsements. The defendant, in answer, gave evidence that, on the 8th of April, 1845, on which day the bills bore date, Edwards was liable to the

Banking Company to the amount of about £4,000 on several overdue bills; that Edwards on that day procured defendant's acceptance to the two bills in question, and transmitted them by letter to the Company, with his name indorsed upon them, for the express purpose of retiring the overdue bills, and on the express condition that such last-mentioned bills should be returned to him by the next post, which condition had never been complied with. Under these circumstances, it was contended that the defendant was entitled to the verdict upon the issues as to the indorsements. The learned judge ruled that the defence should have been specially pleaded, and was not admissible in support of pleas merely traversing the indorsement. Verdict for plaintiff, with leave to move to enter a verdict for defendant. *Martin*, in Michaelmas term last, obtained a rule *nisi* accordingly.

Knowles, *Watson*, and *Unthank* now showed cause. It may be conceded that, if a person indorse a bill for a particular purpose, and the indorsee negotiate it without consideration, and in contravention of such purpose, trover may be maintained for the bill. *Goggerly v. Cuthbert*.¹ But such circumstances would not support a plea traversing the indorsement. In the present case, the condition of the indorsement has been broken, and the title to the bill is thereby revested in the indorser; but it cannot be said that he did not indorse. *Marston v. Allen* and *Adams v. Jones* are distinguishable, for in those cases there was no intention to indorse at all to the alleged indorsee.

Martin (with whom was *F. Robinson*), *contra*. The condition of the indorsement was a condition precedent. There was no intention to indorse, in the sense given to the word "indorse" in *Marston v. Allen*, *Adams v. Jones*, and *Goggerly v. Cuthbert*.² When the bills were sent by Edwards to the Company, with his name on the back of them, he, in effect, said: "Until you give back the old bills, you are not to have any interest in the new bills." The bills were delivered as a mere escrow, as was said by Heath, J., in *Goggerly v. Cuthbert*. If Edwards had been sued on them, and had pleaded specially, the plea would have been an argumentative traverse of the indorsement. (He was then stopped by the court.)

LORD DENMAN, C. J. I think it impossible to distinguish this case from *Marston v. Allen* and *Adams v. Jones*. It is a singular sort of escrow; for the bills were delivered to the parties who, in the event of their performing a certain act, were to be benefited by them. But still I think they were delivered to them as mere trustees, and that the same principle applies.

PATTESON, J. I think this case is within the principle of *Marston*

¹ 2 N. R. 170.

² 12 A. & E. 455.

v. Allen and Adams v. Jones. The facts here are of a different character in some respects; for in those cases it was not intended that the transferee should ever take any interest in the bills. But I think that makes no difference; for here it was not intended that the transferees should take any interest until the old bills were returned, and until that time it is the same thing in principle as if it had been intended that no interest should pass at any time. The bills were received on terms which were not satisfied, and there was no indorsement.

COLERIDGE, J. If there had been in this case the intervention of a third party as agent between the transferor of the bills and the transferees, for the purpose of handing the bills over on performance of the condition, there would have been no difficulty. But in principle it is the same thing; for, until the condition was performed, no interest was to pass to the transferees.

WIGHTMAN, J. I have had great doubt whether the defence was admissible under the issue; for this case, in its facts, seems to go farther than the cases cited; but in principle I find it difficult to distinguish it from *Marston v. Allen*. The analogy of the escrow would be perfect if the delivery of the bills had been to an agent. The principle of *Marston v. Allen* is that, on a plea traversing the indorsement of a bill, its delivery with intent to transfer an interest is put in issue.¹

*Rule absolute.*²

BROMAGE AND ANOTHER v. LLOYD AND ANOTHER.

IN THE EXCHEQUER, MAY 28, 1847.

[Reported in 1 *Exchequer Reports*, 32.]

ASSUMPSIT. The declaration stated that the defendants, on, &c., made their promissory note in writing, and thereby jointly and severally promised to pay one H. Lloyd Harries (since deceased), or order, £300 on demand, and then delivered the said note to the said H. Lloyd Harries, who then indorsed the said promissory note, but without making any delivery thereof; and afterwards, to wit, on, &c., the said H. Lloyd Harries died, having first made his last will and testament, in writing, duly executed and attested as by law required, and thereby

¹ The court allowed the plaintiff to be nonsuited, a fresh action was brought in the Court of Exchequer, and the proceedings are still depending.

² *Goggerly v. Cuthbert*, 2 N. R. 170; *Robinson v. Little*, 9 Q. B. 602 (*semble*), *accord*. *Conf. Hayes v. Caulfield*, 5 Q. B. 81; *Lloyd v. Howard*, 15 Q. B. 995. — ED.

appointed his then wife, to wit, one Jane Harries, executrix thereof, who, after the death of the said H. Lloyd Harries, to wit, on, &c., duly proved the said will and took upon herself the execution thereof, and became and was sole executrix thereof; and she, as such executrix, afterwards, to wit, on, &c., for good and valid consideration to her, as such executrix as aforesaid, in that behalf, transferred the said note, so indorsed as aforesaid, to the plaintiffs, to wit, by delivery thereof to them by her as such executrix as aforesaid; of all which the defendants then had notice, and then, in consideration of the premises, promised to pay the amount of the same note to the plaintiffs, according to the tenor and effect thereof, and of the said indorsement and delivery. Breach, nonpayment.

General demurrer, and joinder.

Phipson, in support of the demurrer. The plaintiffs have no title to sue on the note. An indorsement consists of two things; namely, the writing on the note of the name of the party transferring it, and of a delivery for the purpose of completing such transfer. *Marston v. Allen*. In the present case, the testator wrote his name on the note, but did not deliver it; the executrix has delivered the note without indorsing it. The indorsement by the testator was a mere inchoate act, which could not be rendered complete by the subsequent delivery of the executrix. [PLATT, B. In *Rex v. Lambton*,¹ Wood, B., says: "It is clear that a special indorsement does not transfer the property in bills until they are delivered over."] Suppose the testator had sealed a bond, and died without delivering it, a delivery by his executrix would not render it the deed of the testator. [ALDERSON, B. In *Adams v. Jones*, Lord Denman, C. J., says, "A bill may be indorsed to a party in two ways, either by special indorsement, making it payable to that party, or by a blank indorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party *as indorsee*, in order to constitute an indorsement to him."] An indorsement of a bill by an executor, with delivery, will not bind the assets of the testator. *Child v. Monins*.² *A fortiori* delivery, without indorsement, cannot do so.

The court called on

Keating to support the declaration. First, upon general demurrer, there is a sufficient allegation of the transfer of the note. The declaration alleges that the executrix, for good and valid consideration to her as executrix, transferred the note so indorsed to the plaintiffs, to wit, by delivery thereof to them by her, as such executrix as aforesaid. That allegation is tantamount to a legal indorsement by the executrix.

¹ 5 Price, 442.

² 2 Brod. & Bing. 460.

[ALDERSON, B. The promise alleged in the declaration is to pay according to the tenor and effect of the *said indorsement*.] If a legal transfer can only be made by the party writing his name upon and delivering the note, then, upon general demurrer, such must be taken to be the meaning of the word "transferred." [ALDERSON, B. The true construction of the declaration is this: that the executrix transferred the note "being so indorsed as aforesaid;" that is, indorsed by another person.] The *videlicet* does not control the operation of the word "transfer," or render material the mode in which it is alleged to have been made. *Hammond v. Colls*.¹ A "transfer" may mean either an indorsement or assignment; which latter word is used in the Statute 3 & 4 Anne, c. 9. If the defendant had pleaded by denying the transfer *modo et forma*, and that issue had been found against him, he could not after verdict have taken advantage of any ambiguity in the declaration.

Secondly, even if it be taken on the face of the declaration that there was a mere writing of his name by the testator, and a delivery by the executrix, such transfer would pass the property in the note, and entitle the plaintiffs to sue upon it. Where a testator has delivered a note without indorsement, an indorsement by his executor is equally valid as if made by himself. *Watkins v. Maule*. [ROLFE, B. That case only decides that where a party delivers a note for a valuable consideration, without indorsement, he creates an equitable, not a legal title; and the holder, having an equitable right, is entitled to call on the executor of the party who delivered it to give a formal transfer.] If a note is transferred without indorsement before bankruptcy, the holder may call on the bankrupt or his assignees to indorse it. *Smith v. Pickering*, *Arden v. Watkins*.² There are many instances in which an executor may adopt and ratify the acts of his testator. A cognizance by a defendant, as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor. *Whitehead v. Taylor*.³ In that case, Lord Denman, C. J., says, "The law knows no interval between the testator's death and the vesting of the right in his representative." An executor is not in the situation of a mere agent, but his acts are identified with those of his testator.

Phipson, in reply, was stopped by the court.

¹ 1 C. B. 916.

² 3 East, 817.

³ 10 Adol. & E. 210.

POLLOCK, C. B. This is an action on a promissory note, upon which a party has written his name, and after his death his executrix delivers the note to the plaintiffs without indorsing it; so that there is a writing of his name by the deceased, and a delivery by his executrix. Those acts will not constitute an indorsement of the note: the person to whom it is so delivered has no right to sue upon it.

ALDERSON, B. The promissory note was made payable to the testator "or order;" that means order in writing. The testator has written his name upon the note, but has given no order; the executrix has given an order, but not in writing. The two acts being bad, do not constitute one good act.

ROLFE, B. The word "transfer" means indorsement and delivery.

PLATT, B., concurred.

*Judgment for the defendant.*¹

BUCKLEY v. HANN.

IN THE EXCHEQUER, FEBRUARY 8, 1856.

[*Reported in 5 Exchequer Reports, 43.*]

THIS was a rule calling on the plaintiff to show cause why a suggestion should not be entered on the roll to deprive the plaintiff of costs, under the London Small Debts Act, 10 & 11 Vict. c. 71.

It appeared from the affidavits that the action was by the indorsee against the acceptor of a bill of exchange, drawn by one E. Wood, and by him indorsed to the plaintiff, and was tried before the Secondary of London, under a writ of trial, when a verdict was found for the plaintiff for £12 4s.² The plaintiff resided at Edmonton, in the county of Middlesex; and the bill in question was drawn and accepted, and Wood put his name upon it, at the office No. 70 Lower Thames Street; and it was then sent by a messenger to the residence of the plaintiff, who received it there.

J. Brown, in last Michaelmas term (November 26), showed cause.

W. L. Thomas, in support of the rule. It is sufficient if any part of the cause of action arose within the city of London.

PARKE, B. The statute requires the cause of action — that is, the

¹ *Clark v. Sigourney*, 17 Conn. 511; *Clark v. Boyd*, 2 Oh. 279, *accord.* — ED.

² Only so much of the case is given as relates to the question of indorsement. — ED.

whole cause of action — to arise in the city. In this case, it did not. Until the bill was delivered to the plaintiff, no cause of action arose from the indorsement to him. Upon the other point, we will take time to consider.

*Cur. adv. vult.*¹

¹ Mott v. Wright, 4 Biss. 53, *accord.* — ED.

CHAPTER IV.

TRANSFER.

SECTION I.

Negotiable Bills and Notes.

HODGES v. STEWARD.

⁸ IN THE KING'S BENCH, EASTER TERM, 1691.

[Reported in 1 *Salkeld*, 125.]

IN an action on the case on an inland bill of exchange, brought by the indorsee against the drawer, these following points were resolved : —

1st. A difference was taken between a bill payable to J. S. or bearer and J. S. or order ; for a bill payable to J. S. or bearer is not assignable by the contract so as to enable the indorsee to bring an action, if the drawer refuse to pay, because there is no such authority given to the party by the first contract, and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or otherwise. But when the bill is payable to J. S. or order, there an express power is given to the party to assign, and the indorsee may maintain an action.¹

2dly. Though an assignment of a bill payable to J. S. or bearer be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the indorser and indorsee, and the indorser is liable to an action for the money ; for the indorsement is in nature of a new bill.

3dly. It being objected that in this case there was no averment of the defendant's being a merchant, it was answered by the court that the drawing the bill was a sufficient merchandising and negotiating to this purpose.

4thly. The plaintiff declared on a special custom in London for the

¹ *Jordan v. Barloe*, 3 Salk. 67, accord. — ED.

bearer to have this action. To which the defendant demurred, without traversing the custom; so that he confessed it, whereas in truth there was no such custom; and the court was of opinion that for this reason judgment should be given for the plaintiff. For though the court is to take notice of the law of merchants as part of the law of England, yet they cannot take notice of the custom of particular places; and the custom in the declaration being sufficient to maintain the action, and that being confessed, he had admitted judgment against himself.

5thly. It was held that a general *indebitatus assumpsit* will not lie on a bill of exchange for want of a consideration, for it is but an evidence of a promise to pay, which is but a *nudum pactum*; and therefore he must either bring a special action on the custom of merchants, or else a general *indebitatus* against the drawer for money received to his use.

Judgment pro quer.

NICHOLSON v. SEDGWICK.

IN THE COMMON PLEAS, EASTER TERM, 1697.

[Reported in 1 Lord Raymond, 180.]

CASE. The plaintiff declares, *quod inter mercatores et alios negotiantes intra hoc regnum*, there is, and time whereof, &c., hath been a custom, that if any merchant or other trader make a bill or note in writing, by which he assumes to pay to any other person or the bearer of the bill, such a sum of money, that then such person who makes such note is bound by it to pay such sum to such persons to whom the note is made payable, or to the bearer thereof: then the plaintiff shows that the defendant Sedgwick, being a goldsmith, made a note in writing, by which he promised to pay to one Mason, or to the bearer thereof, £100; that Mason delivered the note to the plaintiff for £100 in value received; and that for non-payment of this £100 by the defendant to the plaintiff upon demand, the plaintiff brought this action against the defendant. *Non assumpsit* pleaded, and verdict for the plaintiff. And it was moved, in arrest of judgment by Sergeant Wright, that this action could not be brought in the name of the bearer, but it ought to be brought in the name of him to whom it was made payable. *Quod fuit concessum per curiam*; for the difference is, where the note is made payable to the party or bearer, and where it is payable to the party or order. In the latter case, the indorsee has been allowed to bring the action in his own name; for there can be no

great inconvenience, because the indorsement of the party must appear upon the back of the note, or some other thing sufficiently intimating his assent; but where it is payable to the party or bearer, if the bearer be allowed to bring the action in his own name, it may be very inconvenient; for then any one who finds the note by accident may bring the action. And though this last has been frequently attempted, it has never yet prevailed. And therefore, in a case in this court between Horton and Coggs, the goldsmith,¹ this difference was taken and agreed; and the judgment there (being the same case with this principal case) was arrested. But the court said that the bearer might bring the action in the name of him to whom the note was made payable. And judgment was arrested, *nisi*, &c. And the same point was resolved in B. R., between Hodges and Steward. But there it was resolved that the indorsement to the bearer binds the party who immediately indorses it to him. The principal point was also resolved (Mich. 6 W. & M. B. R.) between Sir Thomas Escount and Cudworth.²

BULLER v. CRIPS.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1704.

[Reported in 6 Modern Reports, 29.]

A NOTE was in this form: "I promise to pay John Smith, or order, the sum of one hundred pounds, on account of wine had from him." John Smith indorses this note to another; the indorsee brings an action against him that drew this note, and declares upon the custom of merchants as upon a bill of exchange.

A motion was made in arrest of judgment upon the authority of the case of *Martin v. Clarke*.

But *Brotherick* would distinguish this case from that: for there the party to whom the note was originally made brought the action, but here it is by the indorsee; and he that gave this note did, by the tenor thereof, make it assignable or negotiable by the words "or order," which amount to a promise or undertaking to pay it to any whom he should appoint, and the indorsement is an appointment to the plaintiff.

¹ 3 Lev. 299.

² *Horton v. Coggs*, 3 Lev. 299; *Walmesley v. Child*, 1 Ves. Sr. 343 (*semble*); *Bradley v. Trammel*, Hempst. 164, *accord*. — ED.

HOLT, C. J. I remember when actions upon inland bills of exchange did first begin;¹ and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom; at which Hale, C. J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord North's time it was said that the custom in that case was part of the common law of England; and these actions since became frequent, as the trade of the nation did increase; and all the difference between foreign bills and inland bills is, that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest, and the notes in question are only an invention of the goldsmiths in Lombard Street, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty. And, besides, it would empower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of bills of exchange; for the reason of the custom of bills of exchange is for the expedition of trade and its safety; and likewise it hinders the exportation of money out of the realm. He said, if the indorsee had brought this action against the indorser, it might peradventure lie; for the indorsement may be said to be tantamount to the drawing of a new bill for so much as the note is for, upon the person that gave the note; or he may sue the first drawer in the name of the indorser, and convert the money when recovered to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for money in the name of the indorser, and receive it to his own use; and, besides, it is a good authority to the original drawer to pay the money to the indorsee.

And POWELL, J., cited one case, where a plaintiff had judgment upon a declaration of this kind in the Common Pleas; and that my Lord Treby was very earnest for it, as a mighty conveniency for trade; but that, when they had considered well the reasons why it was doubted here, they began to doubt too.

The whole court seemed clear for staying judgment.

At another day, HOLT, C. J., declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him it was very frequent

¹ See 5 Mod. 13.

with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed, I agree, a bill of exchange may be made between two persons without a third; and, if there be such a necessity of dealing that way, why do not dealers use that way which is legal? and may be this; as, if A. has money to lodge in B.'s hands, and would have a negotiable note for it, it is only saying thus, "Mr. B., pay me, or order, so much money value to yourself," and signing this, and B. accepting it; or he may take the common note, and say thus, "For value to yourself, pay me (or indorsee) so much," and good.

And the court at last took the vacation to consider of it.¹

1704.

[3 & 4 Anne, Cap. IX., §§ 1-3.]

WHEREAS it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same. Therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That all notes in writing, that after the first day of May, in the year of our Lord, one thousand seven hundred and five, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also every such note payable to any

¹ *Parkinson v. Finch*, 45 Ind. 122; *Holloway v. Porter*, 46 Ind. 62, *accord.*
Carter v. Palmer, 12 Mod 380 (*semble*), *contra.* — ED.

person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange; and in every such action the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and if such plaintiff or plaintiffs shall be nonsuited, or a verdict be given against him, her, or them, the defendant or defendants shall recover his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants, respectively recovering, may sue out execution for such damages and costs by *capias*, *feri facias*, or *elegit*.

2. And be it further enacted by the authority aforesaid, That all and every such actions shall be commenced, sued, and brought within such time as is appointed for commencing or suing actions upon the case, by the statute made in the one and twentieth year of the reign of King James the First, intituled "An act for limitation of actions, and for avoiding of suits in law."

3. Provided, That no body, politic or corporate, shall have power, by virtue of this act, to issue or give out any notes, by themselves or their servants, other than such as they might have issued, if this act had never been made.

GRANT v. VAUGHAN.

IN THE KING'S BENCH, JULY 4 AND 5, 1764.

[Reported in 3 Burrow, 1516.]

UPON showing cause why a verdict which had been given for the defendant should not be set aside (upon payment of costs) and a new trial granted, the case appeared to be this :—

The defendant, Vaughan, a merchant in London, gave a cash-note upon his banker to one Bicknell, a husband of a ship of his, which note was dated, "London, 22d Oct., 1763," and directed to Sir Charles Asgill, who was Vaughan's banker; and was worded thus: "Pay to ship 'Fortune,' or bearer," so much. Bicknell by some accident lost this note. The person who found it, or who at least was in possession of it (however he might obtain that possession of it), came, four days after the

note was payable in London, to the shop of Grant, the plaintiff, who was a tradesman at Portsmouth, and bought five pounds' worth of tea of him, and gave him this note in payment, desiring to have the change out of it. Grant (the plaintiff) stepped out to make inquiry "who this Vaughan might be;" and upon being informed "that he was a very good man, and that it was his handwriting," he readily gave the change out of the note, retaining the price of the tea. Vaughan, upon being apprised that Bicknell had lost the note, sent notice to Sir Charles Asgill "not to pay it." Whereupon, Grant, being refused payment, brought his action upon the case against Vaughan, and inserted two counts in his declaration, — one, upon an inland bill of exchange; the other, an *indebitatus assumpsit* for money had and received to his use. The cause was tried by a special jury of merchants, who found for the defendant.

Sir Fletcher Norton and *Mr. Dunning* argued on the part of the plaintiff; and *Mr. Morton*, *Mr. Eyre* (Recorder of London), and *Mr. Wallace*, on the defendant's part.

On the part of the defendant, it was insisted:—

That an action could not be maintained on either of these two counts.

That this is not a negotiable note, but only an authority to receive so much cash.

That Grant did not take it upon the credit of the drawer, but upon the credit of the person who gave it him in payment.

That such a draught as this cannot be considered as a negotiable bill of exchange; for it was not accepted nor indorsed; nor was it protestable, nor entitled to any day of grace. It is only a mere contrivance or convenience between the banker and the person who keeps cash with him. And *Mr. Wallace* not only insisted that these cash-notes are never intended to be generally negotiable, but even supposed them to be confined within the extent of the bills of mortality, at furthest. A bill of exchange to A., or bearer, is a bill of exchange to A. himself, but is not negotiable. And there is no instance (as the Recorder said) of any custom of merchants, "for a bill of exchange being made payable to bearer," generally.

In *Horton v. Coggs*,¹ on an action brought by the bearer of a goldsmith's note payable to B., or bearer, the custom "to pay to the bearer" was holden too general.

In *Hodges v. Steward*, the first point resolved is, "That a bill of exchange payable to J. S. or bearer is not assignable by the contract; so as to enable the indorsee to bring an action, if the drawer refuse to pay."

The preamble to 3 & 4 Anne, c. 9, does not say one word about

¹ 3 Lev. 290.

notes payable to bearer. It begins thus: "Whereas it has been held, that notes in writing, whereby the party promises to pay unto any other person or his order, are not assignable," &c. And though the words, "or unto bearer," are slipped into the enacting part of the first clause, yet no part of the whole statute bears any relation to them.

In the case of *Morris v. Lee* (which was an action brought by the indorsee of a note "to be accountable to A., or order, for £100"), the court observed that the words "or order" was the proper expression used in such notes, and mentioned in the Act of Parliament where it intended the note should be indorsable or negotiable.

Arguments therefore arising from cases upon notes of hand will not prove much in the present case.

And, upon the second count, the plaintiff can have no pretence, they said, to recover against Mr. Vaughan: he can only resort to the person from whom he received or purchased the note. This note is not like a banker's note, payable to bearer. However, even upon one of them the bearer cannot recover as bearer, for which they cited the case of *Walmesley v. Child*.

If a bill is payable "to bearer" only, the original advancer of the money may, indeed, maintain an action against the drawer upon an *indebitatus assumpsit*, for money had and received to his use; but no other person can do so, though he comes by it fairly and upon a valuable consideration. And for this they cited the above-mentioned case of *Hodges v. Steward*.

The plaintiff's counsel insisted that this bill or note was in its nature negotiable; and that such bills were in fact always considered as negotiable, and actually negotiated, and commonly circulated as cash. And if they be, from the nature of the contract, negotiable, the finding of the jury cannot alter the law: it is not the province of the jury, but of the court, to determine what is or is not an inland bill of exchange or a promissory note, within the statute. If the jury founded their verdict on law, they have mistaken the law; if on fact, it is directly contrary to the notoriety of the fact; and bank-notes alone are a full and sufficient proof of that. And it is not to be conceived that they are negotiable within the bills of mortality, and not negotiable beyond or out of them: if they are negotiable anywhere, they must be so everywhere.

They object "that it is not a bill of exchange, because it is not accepted, nor can be protested, nor is entitled to a day of grace, nor is indorsable."

But it is a negotiable instrument: it is not necessary that it should be a bill of exchange. An inland bill of exchange is not like a foreign bill of exchange; for the former could not have been protested before

this act of parliament, nor needs to be so, since the act; whereas a foreign one always absolutely required it. This is just the same as a bill payable to bearer. The name of the person to whom such a bill is made payable means nothing at all, in general cases of being made payable "to such a one, or bearer;" much less can it mean any thing in this particular case, where no name of a person precedes, but the payment is to be "to ship 'Fortune,' or bearer."

Then it is extremely clear (and, indeed, admitted) that the plaintiff came by it fairly and honestly and *bona fide*, and upon a valuable consideration, and without notice of its being a lost bill. He therefore stands in the place of Bicknell, and is equally entitled to maintain his action as Bicknell himself would have been, if he had never lost it nor parted with it; and he is entitled to recover upon either of the two counts laid in the declaration. It is equal to him, indeed, which of them he recovers upon; and there can be no doubt as to the latter. And, as to the former, the court will not readily listen to objections about forms, when the true merits and honest title are clear and plain.

The only true and fair question is, "Whether Bicknell or Grant ought to bear this loss."

And surely there can be no doubt as between the man who lost the note (be it accidentally or carelessly) and a fair purchaser of it for a valuable consideration.

This case was determined in the case of *Miller v. Race*. That resolution was founded upon the fair purchaser's having a better right than the loser of a bank-note; even though the man was, in that case, robbed of it.

Whoever gives a note payable to bearer expressly promises to pay it to every fair bearer. However, an implied promise would suffice for our purpose.

This point is clearly settled by the act of 3 & 4 Anne, c. 9, which puts notes of hand upon the same foot with both sorts of bills of exchange, and makes them assignable (though choses in action). It enacts that all notes in writing, promising to pay to any person or order, or unto bearer, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons to whom the same is made payable; and that the assignee may bring his action in like manner as in cases of inland bills of exchange.

It is objected that the words "or to bearer" were not intended to have any operation; because no notice is taken, in the preamble of the statute, of notes made payable to bearer, but only of notes which are made payable to a person or his order.

But how could any notice be taken of the former in the preamble?

Such notes did not require indorsement ; and the preamble only recites "that the latter had been holden not to be assignable or indorsable over, within the custom of merchants ; and that the assignee or indorsee could not, within the custom of merchants, maintain an action upon them against the drawer." But they were negotiable before the act was made ; and an action would so far have lain upon them that they were evidence of a debt, and would put it upon the defendant to show that the debt was satisfied. The person to whom such a note was given might have declared in a general *indebitatus assumpsit* for money lent, and the note would have been good evidence of it ; though he could not have declared upon the custom of merchants. This was settled in the case of *Clerke v. Martin*. And Lord Ch. J. Holt was peevish there, and said "that the continuing to declare upon these notes, upon the custom of merchants, proceeded from obstinacy and opinionativeness ; since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent."

That action was brought upon a note payable to the plaintiff Clerke, or his order, and brought by Clerke himself. But actions had been sometimes brought by the bearer, before the making of the statute of 3 & 4 Anne, upon bills or notes payable to bearer only, particularly in the case of *Nicholson v. Sedgwick*.

Hinton's Case, in 2 Shower, 235 (though loosely reported), is on the plaintiff's side as far as it goes. It is plain that the plaintiff Hinton brought the action as bearer ; and the case fully proves "that the action would lie, if the plaintiff came by the bill of exchange honestly and on a valuable consideration," this being Lord Chief Justice Pemberton's general allegation.

As to the case of *Horton v. Coggs*, reported in 3 Lev. 299, the reason given why the custom "to pay to the bearer" is too general (viz. "that, perhaps, the goldsmith, before notice by the bearer, had paid it to Barlow himself"), is a bad one.

The case of *Nicholson v. Sedgwick* was exactly like the case of *Horton and Coggs* ; and the court agreed "that the action could not be brought in the name of the bearer, but ought to be brought in the name of him to whom the note was made payable." But the reason there given is not a sufficient one. It is this : "that, if the bearer should be allowed to bring the action in his own name, it might be inconvenient ; for then any one who finds the note by accident may bring the action and recover." Whereas, it appears by Hinton's Case "that he must entitle himself to it on a valuable consideration ; for, if he come to be bearer by casualty or knavery, he shall not have the benefit of it." Neither does that reason (if it had been a better one

than it is) clash with the present case, because this plaintiff did here pay a valuable consideration for the note.

And to urge the necessity of the action's being brought in the name of the person to whom the note was originally made payable would carry the matter too far; for that would prove that Bicknell himself could not have maintained the action, since the note is not made payable to him, but to ship "Fortune." Yet, without doubt, Bicknell himself might have maintained the action. And this appears by a remark of Lord Raymond's in reporting the case of Tassel and Lee v. Lewis: "That if the party to whom the note is delivered demands the money of the goldsmith in reasonable time, and he will not pay it, it will charge him who gave the note. *Hopkins v. Geary*." ¹

It would be absurd, indeed, to say "that the bearer could maintain an action upon a note that he came dishonestly by." Certainly, he cannot; for he must prove "that he came by it honestly."

As to the inference drawn from the case of *Morris v. Lee*, "that these notes made 'payable to bearer' were not intended to be negotiable," it is impossible to suppose such a thing: the contrary is most clear and apparent. This was one of the matters which the act of 3 & 4 Anne intended to remedy. The cases relied on by the defendant were prior to that act: there is none since the making of it that can avail them. And there is no case at all where it has been determined that a note of this kind cannot be given in evidence upon a general *indebitatus assumpsit* for money had and received.

It is enough for the plaintiff that this note was negotiable. The bearer must prevail against the drawer in some mode of action, having come by it fairly and honestly. Since the act, the fair holder of a note payable to bearer may, by the express words of the act, maintain an action against the drawer; otherwise, the act would not put promissory notes upon the same foot with inland bills of exchange, as it professes to do. The words of it are: "shall and may maintain an action for the same, in such manner as he might do upon any inland bill of exchange." And the interests of commerce require this determination. But there can be no sort of doubt on the latter count, as the note is evidence of the plaintiff's money being in the hands of the person who gave it.

Whether, therefore, this case be considered upon principles of law, prior to the act of 3 & 4 Anne, or upon that act, or upon what has passed since the act, it will appear that the plaintiff ought to recover in this action; and, consequently, the present verdict is a wrong one, and ought to be set aside.

And no inconvenience can happen, nor will any injustice be done

¹ H. 1 Ann., B. R. Guildhall.

thereby; for the matter will be open to evidence, and all facts may appear.

LORD MANSFIELD said, the case of Nicholson and Sedgwick was urged by the defendant's counsel at the trial; and, not being apprised of the point in question till it came on to be tried before him, he was not fully aware of the cases which differed from it. And yet he was struck, he said, very strongly that, upon general principles, that case was not agreeable to law and justice; and he then thought that the reasons upon which that case and the other authorities relied upon by the counsel for the defendant at the trial were grounded were insufficient ones.

That "of the goldsmith's having, perhaps, paid the money to the original payee himself, before notice from the bearer," can never hold: it cannot happen, in the course of business, that the money should be paid to the nominee before notice from the bearer.

Nor was any satisfactory reason given why an action might not be brought in the bearer's own name. The reason alleged, "that then any person who finds the note accidentally may bring an action and recover," is insufficient; because the plaintiff in such action must prove that he came by it *bona fide*, and upon a valuable consideration.

As to the necessity of bringing the action in the name of the person to whom the note was originally made payable, it was impossible in the present case, because there was no person originally named as the payee: it runs, "pay to ship 'Fortune,' or bearer." However, if there had been a person named, the reason would not hold; for the person so originally named may become bankrupt, or may be indebted to the drawer of the note, so as to give the drawer a right to set off such debt against the demand of the money due upon the note. So that, if the courts of law should not allow the bearer to bring the action in his own name, there might be no relief at all. And it can never be supposed reasonable or legal that the banker should have it left in his discretion or choice to pay the money to one or the other, as his fancy or inclination should lead him.

These thoughts occurred to me at the trial; and therefore I chose to take the opinion of the court.

I left two things to the consideration of the jury. The first was, "whether the plaintiff came to the possession of this note fairly and *bona fide*" (which necessarily includes his not having notice of its being a lost note). The second was, "whether such draughts as this is were, in the course of trade dealing and business, actually paid away and negotiated, or in fact and practice negotiable." And I then considered this, as leaving a plain fact to them upon which they could have no doubt.

But I am now clearly of opinion that I ought not to have left the latter point to them; for it is a question of law "whether a bill or note be negotiable or not."

It appears in the books "that these notes are, by law, negotiable." And the plaintiff's maintaining his action, or not maintaining it, depends upon the question "whether such a note is negotiable or not."

It appears, likewise, "that the bearer of them may maintain an action as bearer, where he can entitle himself to them on a valuable consideration."

Hinton's Case, in 2 Shower, 235, is this: "Case on a bill of exchange, against the drawer (bill not being paid), and payable to J. S. or to the bearer. The plaintiff brings the action as bearer. And, upon evidence, ruled by the Lord Pemberton, that he must entitle himself to it on a valuable consideration (though among bankers they never make indorsements in such case); for, if he come to be bearer by casualty or knavery, he shall not have the benefit of it." (And it would be absurd to indorse such bills as are made payable to bearer.)

"If a bill be payable to A. or bearer, it is like so much money paid to whomsoever the note is given; that, let what accounts or conditions soever be between the party who gives the note and A. to whom it is given, yet it shall never affect the bearer, but he shall have his whole money." *Crowley v. Crowther*.¹ So that the whole interest is transferred to the bearer.

1 Salk. 126, pl. 5, anonymous, *coram* Holt, C. J., at Nisi Prius, at Guildhall: "A bank-bill, payable to A. or bearer, being given to A., and lost; was found by a stranger, who transferred it to C. for a valuable consideration: C. got a new bill in his own name. *Per* Holt, C. J. A. may have trover against the stranger who found the bill, for he had no title (though the payment to him would have indemnified the bank); but A. cannot maintain trover against C. by reason of the course of trade, which creates a property in the assignee or bearer." It is negotiable by delivery.

Miller v. Race. The holder of a bank-note recovered against the cashier of the bank, though the mail had been robbed of it, and payment was stopped; it appearing that he came by it fairly and *bona fide*, and upon a valuable consideration. And there is no distinction between a bank-note and such a note as this is.

The act of 3 & 4 Anne, c. 9, puts promissory notes upon the same foot throughout with inland bills of exchange. And therefore whatever is the rule as to inland bills of exchange payable to bearer must be so likewise as to notes payable to bearer.

¹ 2 Freeman, 257, in chancery.

In a case between *Walmesley v. Child*, 11th December, 1749, in chancery, where one of Mr. Child's notes, payable to bearer, was lost or stolen, and payment stopped by the true owner, who demanded that it should be paid to him, Mr. Child refused to pay it without surety against the demands of a future bearer. The true owner brought his bill. Lord Hardwicke dismissed the bill, unless the true owner would find such security. And he went upon the principle that no dispute ought to be made with the bearer of a cash-note who comes fairly by it, for the sake of commerce, to which the discrediting such notes might be very detrimental.

Upon looking into the reports of the cases on this head, in the times of King William III. and Queen Anne, it is difficult to discover by them when the question arises upon a bill and when upon a note; for the reporters do not express themselves with sufficient precision, but use the words "note" and "bill" promiscuously. It appears, however, that there were different opinions about the manner of declaring upon them. Lord Ch. J. Holt got into a dispute with the city about it. He was of opinion that the plaintiff could not declare as upon a specialty (where the consideration could not be disputed); but he all along agreed that the plaintiff might declare upon an *indebitatus assumpsit*. The objection was to bringing an action upon the note itself, as upon a specialty; but I do not find it anywhere disputed that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one or order.

Great force arises from the Act of Parliament of 3 & 4 Anne, putting notes merely upon the foot of inland bills of exchange, and particularly specifying notes payable to bearer.

But, upon the second count, the present case is quite clear beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use may be brought by the *bona fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and, if so, it is for the use of the person who has the note as bearer. In this case, Bicknell himself might undoubtedly have brought this action. He lost it; and it came *bona fide*, and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. Bicknell and the plaintiff are both innocent. The law must determine whether of them is to stand to the loss. And, by law, it falls upon Bicknell.

There ought to be a new trial.

MR. JUSTICE WILMOT. If a verdict be given without evidence at all, or against plain evidence, or against law, it ought not to stand.

The two matters left to the consideration of the jury upon this trial

were, "whether the plaintiff came by this note fairly and *bona fide*," and "whether such notes or bills as this is are, in fact and practice, negotiated."

The latter is as plain and notorious as that there is a bank of England: no man can doubt it. The verdict is, therefore, against evidence as to this point.

Probably, the jury took upon themselves to consider "whether such bills or notes as this is were in their own nature negotiable." But this is a point of law; and by law they are negotiable. Their verdict is, therefore, against law, and ought to be set aside. For, though when facts and law happen to be so complicated and intermixed that a jury cannot help taking both into their consideration, it may be difficult or even impossible for them to avoid founding their verdict upon both; yet they are not at liberty to determine contrary to law: they ought to take their notion of law from the direction of the judge who tries the cause. Formerly, a jury would have been liable to an attain for such a verdict; now, the court control their verdicts by setting them aside, and granting a new trial.

As to the other matter,—the manner how this plaintiff came by the note,—it appears to have been taken by him fairly and *bona fide* in the course of trade, and even with the greatest caution: he made inquiry about it, and then gave the change for it. And there is not the least imputation or pretence of suspicion that he had any notice of its being a lost note.

So that this verdict is clearly against law; for, if the note be negotiable, and the plaintiff came fairly by it, he was entitled to recover.

Though both the claimants were innocent, yet as Bicknell lost the note, and Grant took it in the course of trade, *bona fide* and upon a valuable consideration, Grant has the better equity. But, if their equity were only equal, it is a known and a good rule that "*melior est conditio possidentis*;" and that would be sufficient to turn the scale. If there was negligence on one side, and none on the other, that also would turn the scale; and, if there be any on either side in this case, it should seem to be rather imputable to the person who lost it than to him who thus took it in the course of trade.

If this bearer cannot bring an action upon it, nobody can; for, as it is not made payable to any particular person by name, no action can be brought in the name of such particular person.

But this is a negotiable note, and the action may be brought in the name of the bearer. "Bearer" is *descriptio personæ*; and a person may take by that description as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a con-

tract "to pay the bearer, or to the person to whom he shall deliver it" (whether it be a note or a bill of exchange); and it is repugnant to the contract that the drawer should object "that the bearer has no right to demand payment from him."

Then upon the cases: Hinton's Case¹ is decisive; and it is agreeable to common sense and reason "that if a man comes by such a note or bill fairly, and on a valuable consideration, he should have a right to maintain an action upon it as bearer."

The reasons given in the cases that are opposite to this are altogether unsatisfactory. Those determinations strike at this great branch of commerce: if they were to prevail, they would put an end to all this species of it. Who would take a bill or note payable to one or bearer, if the person named in it might release it, or if a debt of his might be set off against it?

On the other hand, it is but just and reasonable that, if the bearer brings the action, he ought to entitle himself to it on a valuable consideration, and strictly to prove his coming by it *bona fide*.

Even before the statute of 3 & 4 Anne, Lord Ch. J. Holt himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note; and, if it was a question antecedent to that act, I should stand by that first case of Hinton, rather than the latter ones which differ from it.

But that statute was made expressly and on purpose to obviate these doubts.

However, if you would suppose it made to introduce a new law, and that such an action could not have been maintained before the making of it, yet it is the manifest and professed intent of the act to put promissory notes upon the same foot with inland bills of exchange; and it clearly means to make notes payable to bearer liable to actions brought upon such notes as upon a specialty.

And no case having happened upon this head since the making of the statute is a circumstance which shows that the statute was so understood, and that the true and sound construction of it is "that promissory notes should be put upon the same foot with inland bills of exchange." If it should be construed otherwise, it would follow "that inland bills of exchange would be upon a better foot than promissory notes," which would be contrary to the words and meaning of the statute.

This now under consideration is a negotiable instrument, which, I think, participates more of the nature of a promissory note than of a bill of exchange. But taking it as a bill of exchange, a bill of ex-

¹ 2 Show. 235.

change is a promise "to pay the money, if the drawee does not pay it;" consequently, the payee may bring the action against the drawer.

In this particular case, if the bearer cannot bring the action, who can? No person at all is named. It is, "Pay to ship 'Fortune,' or bearer." Therefore, this particular case is out of all the cases cited. For they say "that the action must be brought in the name of the person to whom the note is made payable;" but there is no such person in the present case.

It would be of infinite inconvenience, and would introduce the utmost confusion, if it were to be established "that the bearer of a bill or note made payable to bearer could not maintain his action upon it."

As to its being negotiable within the bills of mortality and no further, there is no color for such a distinction: it must be negotiable everywhere, if it is negotiable at all.

Upon the whole, I think this to be a verdict against law, and am of opinion that it ought to be set aside.

MR. JUSTICE YATES delivered his opinion much to the same effect, and clearly held the verdict to be against law.

It was not within the province of the jury to determine upon the negotiability of this note: it was a question of law, not of fact, "whether such a bill or note was or was not negotiable."

And nothing can be more peculiarly negotiable than a draught or bill payable to bearer, which is, in its nature, payable from hand to hand, *toties quoties*.

And he was of opinion that an action will lie for the bearer of such a bill.

The reasons given against it, in the cases which have been cited by the defendant's counsel, are not at all satisfactory.

It had been doubted, it is true, "whether that species of action where the plaintiff declares upon the note itself as upon a specialty was proper;" but here is a count upon a general *indebitatus assumpsit* for money had and received to the plaintiff's use. The question, "whether he can maintain this action," depends upon its being assignable or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer; and therefore he was certainly entitled to bring this action. And if he transfers his property to another person, that other person may also maintain the like action: whoever has money in the hands of another may bring such an action against him. This appears from the determination of the case of *Ward v. Evans*, reported in 2 Ld. Raym. 930, where not a shilling of money had passed between the plaintiff and defendant; and yet Hold and Powell both held "that an *indebitatus assumpsit* for moneys received to the plaintiff's use properly lay."

In the present case, the drawer had money in his hands belonging to Bicknell; and Bicknell must be considered as having delivered this instrument to the plaintiff Grant, which is tantamount to an indorsement. (A real indorsement of a note payable to bearer would have been absurd.) The delivery of it must indeed be proved; and the circumstances of the present case do amount to a proof of a delivery of it to the plaintiff. And there is no doubt about his having come by it fairly, *bona fide*, and on a valuable consideration.

There would be great inconveniences if such an action as this is might not be brought by the bearer. If no action could be brought but in the name of the person to whom the bill or note was originally made payable, that person might release the action, or a debt due from him might be set off against it in account; and so the true owner of the note might lose the whole or part of it, though it was transferred to him upon a valuable consideration.

As to the notion of its being negotiable in London, and not elsewhere, there is no foundation for such an imagination. It must be equally so out of London as in London; and it is just the same as a bank-note.

Upon the whole, I think the jury have done wrong, and therefore the verdict ought to be set aside.¹

*Per Cur. (unanimously and clearly). Rule made absolute (for a new trial).*²

¹ *Shelden v. Hentley*, 2 Show. 160 (*semble*); *Hinton's Case*, 2 Show. 235; *Anon.*, 1 Salk. 126; *Crawley v. Crowther*, *Freem. C. C.* 257; *Waynam v. Bend*, 1 Camp. 175; *Bullard v. Bell*, 1 Mas. 243, 252; *Carroll v. Meeks*, 3 Port. 226; *Edison v. Frazier*, 9 Ark. 219; *Carson v. Tatum*, 24 Ark. 13; *Cox v. Adams*, 2 Ga. 158; *Creighton v. Gordon*, *Morris (Iowa)*, 41; *Hotchkiss v. Thompson*, *Morris (Iowa)*, 156; *Shelton v. Sherfey*, 3 Greene, 108; *Eddy v. Bond*, 19 Me. 461; *Dole v. Weeks*, 4 Mass. 451; *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Ellis v. Wheeler*, 3 Pick. 18; *Wilbour v. Turner*, 5 Pick. 526; *Truesdell v. Thompson*, 12 Met. 565; *Tillman v. Ailles*, 13 Miss. 373; *Cobb v. Duke*, 36 Miss. 60; *Hathcock v. Owen*, 44 Miss. 799; *Hutchings v. Low*, 1 Green, 246; *Pierce v. Crafts*, 12 Johns. 90; *Avery v. Latimer*, 14 Oh. 542; *Rankin v. Woodworth*, 2 Watts, 134; *Putnam v. Crymes*, 1 McMull. 9 (a note payable to A. "or holder"); *Matthews v. Hall*, 1 Vt. 316, *accord*.

Conf. Sprowl v. Simpkins, 3 Ala. 515; *White v. Joy*, 4 Ala. 571; *Dawson v. Jewett*, 4 Greene, 157; *Mainer v. Reynolds*, 4 Greene, 187. — *Ed.*

² The plaintiff, upon such new trial, recovered the money.

MILNE v. GRAHAM.

IN THE KING'S BENCH, JANUARY 29, 1823.

[Reported in 1 *Barnewall & Cresswell*, 192.]

ACTION by the indorsee against the maker of a promissory note. At the trial before Abbott, C. J., at the London sittings after last term, it appeared that the note was made at Dundee, in Scotland; and it was objected that an action was not maintainable by the indorsee of a promissory note against the maker, except where the note is made in England. It was contended that the statute only contemplated inland promissory notes; and, if so, that a promissory note made in Scotland was to be considered a foreign note, and not within the statute; and Selwyn's *Nisi Prius*, 377, was referred to. The Lord Chief Justice overruled the objection, and the plaintiff had a verdict. Chitty now moved for a new trial, and urged the objection taken at the trial.

Per Curiam. This is both within the words and the spirit of the act. The words are "all notes." The act was made for the advancement of trade, and ought, therefore, to receive a liberal construction. It is for the advantage of commerce that foreign as well as inland notes should be negotiable. This is, therefore, within the spirit of the act.

*Rule refused.*¹

¹ *Splitgerber v. Kohn*, 1 Stark. 125; *Roche v. Campbell*, 3 Camp. 247; *Houriet v. Morris*, 3 Camp. 303; *Bentley v. Northouse*, M. & M. 66; *Hatcher v. McMorine*, 4 Dev. 122 (*semble*), *accord*.

Carr v. Shaw, Bayley, Bills (6th ed.), 28 (*semble*), *contra*. — ED.

ROBINSON, ASSIGNEE, v. BROWN.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1835.

[Reported in 4 Blackford, 128.]

A PROMISSORY note, executed by Ryland T. Brown and Alexander Gregg, and payable to Joseph S. Burr, was indorsed by the payee as follows: "Mr. Gregg, — Pay the within to Jesse Robinson. (Signed) Joseph S. Burr." Held, that this indorsement did not transfer the legal ownership of the note to Robinson, and authorize him to maintain a suit on it against the makers or either of them, in his own name.¹

¹ *Fernon v. Farmer*, 1 Harringt. 32; *Reed v. Murphy*, 1 Ga. 236; *Noland v. Ringgold*, 3 Har. & J. 216; *Yingling v. Kohlhas*, 18 Md. 148; *Matlack v. Hendrickson*, 1 Green, 263; *Gerard v. La Coste*, 1 Dall. 194; *Barriere v. Nairac*, 2 Dall. 249; *Pratt v. Thomas*, 2 Hill (S. Ca.), 654, *accord*.

Chrichton v. Gibson, Mor. Dict. Dec. 1446; 1 Ross, 51, s. c.; *Robinson v. Burdekin* (Court of Session), 6 D. 17; 1 Ross, L. C. 812, s. c.; *Thackaray v. Hanscom*, 1 Col. 365 (statutory); *Cohen v. Prater*, 56 Ga. 203 (statutory); *Goodman v. Fleming*, 57 Ga. 350 (statutory); *Roosa v. Crist*, 17 Ill. 450 (statutory); *Maxwell v. Goodrum*, 10 B. Mon. 286 (statutory); *Bacon v. Cohea*, 20 Miss. 516, 519 (statutory); *Halsey v. Dehart*, Coxe, 93; *Whitman v. Childress*, 6 Humph. 303, 307 (statutory), *contra*.

Conf. Kershaw v. Cox, 3 Esp. 246; *Knill v. Williams*, 10 East, 431; *Bathe v. Taylor*, 15 East, 412; *Byrom v. Thompson*, 11 A. & E. 81.

In *Putnam v. Crymes*, 1 McMull. 9, a note payable to A., "or holder," was deemed negotiable. In *Raymond v. Middleton* (29 Pa. 529, 530), the following extra-judicial observations were made by Porter, J., in delivering the opinion of the court: "So commonly are the terms 'or order,' 'or bearer,' employed in commercial instruments, that we are apt to suppose them essential to negotiability. It is otherwise. Words are but the signs: thought is chiefly valuable; and when, for a sufficient consideration, the minds of the parties have concurred in an agreement, that is a contract, and it must be executed as they intended, unless forbidden by law. 'Order' or 'bearer' are convenient and expressive, but clearly not the only words which will communicate the quality of negotiability. 'Some equivalent words should be used.' Story on Bills, § 60. 'Words in a bill, from which it can be inferred that the person making it, or any party to it, intended it to be negotiable, will give it a transferable quality against that person.' *United States v. White*, 2 Hill, 59. The concession, therefore, may be made, that if the makers of this note, having omitted the usual words to express negotiability, had said, 'This note is and shall be negotiable,' it would have been negotiable."

But the insertion of the words "negotiable and payable at bank" will not make a bill or note negotiable generally. *Jones v. Wood*, 3 A. K. Marsh. 162; *Carruth v. Middleton*, 2 Phil. (Pa.) 45; *Raymond v. Middleton*, 29 Pa. 529. But see *Muir v. Jenkins*, 2 Cr. C. C. 18, *contra*.

See also *Cariss v. Tattersall*, 2 M. & G. 890, 892; *U. S. Bank v. White*, 2 Hill, 59.

A note payable "to the bearer, A.," is, of course, not negotiable. *Warren v. Scott*, 32 Iowa, 22.—ED.

SECTION II.

Mode of Transfer.

(a) DELIVERY.

DEATH *v.* SERWONTERS.

IN THE KING'S BENCH, HILARY TERM, 1685.

[Reported in Nelson's *Lutwyche*, 272.]

DEBT brought on a bill of exchange, setting forth the custom of merchants: viz., that if a merchant at Venice did draw a bill upon a merchant in London, and it was accepted, then he became chargeable with the contents to the party to whom it was directed; and, if he indorsed it to another, the acceptor was then liable to the indorsee; and, if the first indorsee should afterwards indorse it, that the acceptor is still liable to the second indorsee; and if he should not pay the money to him, then if the second indorser pay it, the acceptor is become liable to him.

That John Baptista Morelli, a merchant in Venice, drew a bill of exchange for 1000 ducats upon Death, the defendant in the original action, payable to George Ebretz, which bill the said Death accepted.

That Ebretz indorsed it for value received to the plaintiff Serwonters.

That Serwonters indorsed it to Adam Conrade, who likewise indorsed it to De Barry; that the defendant Death, not paying the money to Conrade or De Barry, the plaintiff Serwonters paid it to Conrade; *per quod*, the defendant Death became chargeable to the plaintiff.

There was a frivolous plea to this declaration, and upon demurrer to it judgment was given for the plaintiff in B. R., and now a writ of error was brought in the Exchequer Chamber, and the error assigned was:—

That this is an unreasonable custom, because the defendant Death might be charged at the suit of all the indorsees.

But it was answered that, when the first indorser had signed the bill, the defendant stood no longer liable to him; and when the plaintiff, who was the second indorser, had indorsed it to Conrade, the defendant Death was no longer liable unto him; until, by his pay-

ing it to Conrade, he was again entitled to receive it of Death, so that, after the plaintiff had paid the money, none of the indorsees had any remedy; but the plaintiff alone had a right of action against the person upon whom the bill was drawn, and who had accepted it.

There was another objection; viz., that the plaintiff had not averred that the bill was drawn for value received by the drawer: but this was so frivolous that I do not find it was insisted on, and therefore judgment was affirmed.¹

SMITH AND OTHERS v. CLARKE.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JULY 21, 1794.

[*Reported in Peake*, 225.]

THIS action was brought by the plaintiffs as indorsees of a bill of exchange against the acceptor.

The bill was indorsed in blank by the payee, and, after several indorsements, it came to one Jackson (whose assignees had indemnified the present defendant) under a special indorsement to him or order. Jackson sent it to Muir and Atkinson, and they discounted it with the plaintiffs, but Jackson had not indorsed it. The plaintiffs had struck out all the indorsements except the first.

Law, for the defendant, objected that this special indorsement had restrained the negotiability of the bill, and that the plaintiffs could not recover without an indorsement by Jackson.

LORD KENYON. The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement, being made after the payee had indorsed it, cannot affect the title of the present plaintiffs.

NOTE. — The plaintiffs afterwards proved a letter from Jackson to Muir and Atkinson, desiring them to discount this and other bills, but Lord Kenyon thought the plaintiffs' case sufficiently made out without this evidence.

*Verdict for the plaintiffs*¹.

¹ *Walker v. MacDonald*, 2 Ex. 527; *Savannah Bank v. Haskins*, 101 Mass. 370; *Houry v. Eppinger*, 34 Mich. 29; *Watervliet Bank v. White*, 1 Den. 608; *Pentz v. Winterbottom*, 5 Den. 51; *French v. Barney*, 1 Ired. 219; *Rand v. Dovey*, 83 Pa. 280, *accord*.

Conf. Freeman v. Brittin, 2 Harr. 191; *Myers v. Friend*, 1 Rand. 13. — Ed.

ORD AND TWO OTHERS v. PORTAL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., MAY 27, 1812.

[Reported in 3 Campbell, 239.]

ACTION by the plaintiffs as indorsees against the defendant as acceptor of a bill of exchange, drawn by one Sted, payable to his own order, and indorsed by him in blank.

The plaintiffs' case being closed, without showing that the plaintiffs were in partnership, or that the bill had been indorsed to them jointly, —

Garrow, for the defendant, insisted that they ought to be nonsuited. The declaration alleged that the drawer of the bill indorsed and delivered the bill to the three plaintiffs, and there was no evidence whatsoever in support of this allegation.¹

LORD ELLENBOROUGH. There is no occasion for any such evidence. The indorsement in blank conveys a joint right of action to as many as agree in suing on the bill.

*The plaintiffs had a verdict.*²

EMMETT v. TOTTENHAM.

IN THE EXCHEQUER, MAY 25, 1853.

[Reported in 8 Exchequer Reports, 884.]

THE declaration was on a bill of exchange drawn by one Coghlan upon and accepted by the defendant, and indorsed by Coghlan to the plaintiff.

The defendant pleaded (*inter alia*), secondly, that it was not indorsed to the plaintiff; and, thirdly, that the plaintiff was not, at the commencement of the suit, the holder of the bill: upon which issues were joined.

At the trial before Alderson, B., at the last Kent assizes, the following facts appeared: The bill, which was accepted by the defendant, was discounted for Coghlan by one Rickards, to whom it was indorsed

¹ In point of fact, the plaintiffs were assignees of a bankrupt, and this bill was indorsed to them in payment of a debt due to the bankrupt estate.

² *Rordasnz v. Leach*, 1 Stark. 446; *Low v. Copentake*, 3 C. & P. 300; *Attwood v. Rattenbury*, 6 Moore, 579; *Neely v. Morris*, 2 Head, 595, *accord*.

Conf. Machell v. Kinnear, 1 Stark. 499. — ED.

in blank. Rickards afterwards indorsed the bill by delivery to a Mr. Walker, at the same time guaranteeing its due payment. Mr. Walker shortly afterwards died; and the bill was found by his son and executor, the Rev. Dr. Walker, among his father's papers. Dr. Walker wishing to obtain the amount of the bill, but being unwilling that his own name should appear in an action upon the bill, requested Rickards to take the proper steps for that purpose, by suing upon the bill in the name of some third party. Rickards applied to Emmett (the plaintiff) to bring the action, and he consented to sue upon the bill; and thereupon Rickards called upon Dr. Walker, and communicated the arrangement to him, and asked for a copy of the bill. Dr. Walker handed him the bill, which he copied, and then returned it to Dr. Walker, at the same time saying that it would be safer in his hands until the plaintiff wanted it; to which Dr. Walker replied, that the plaintiff might have it whenever he required it. The bill was subsequently given by Dr. Walker to his agent, and by him after action brought to the plaintiff, and it was produced at the trial.

It was contended, on the part of the defendant, that upon this state of facts the plaintiff had no such title to the bill as would sustain the action. The learned judge left the case to the jury, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him upon the second and third issues.

A rule *nisi* having been obtained accordingly,

M. Chambers and *Lush* showed cause. The plaintiff had such a title to the instrument as was sufficient to support the action; for he had an interest in the bill, and had the right of possession. The law does not require the actual manual possession of the bill to constitute a party the holder. If an indorser were to place a bill in plaintiff's cash-box, that would be a sufficient possession to support an action upon the bill. The defendant cannot set up a *jus tertii*. There was evidence that the plaintiff had constructive possession of the bill. [MARTIN, B. I remember a case of *Gill v. Lord Chesterfield*,¹ in which I was counsel. It was an action upon a check for £500. It appeared that the plaintiff had consented to lend his name for the purpose of suing upon the check; but he never had possession of it, nor had he otherwise interfered. ROLFE, B., before whom the cause was tried, held that the action was not maintainable, and this court supported that ruling.] The plaintiff there appears to have had no interest in the instrument upon which he sued. Here the plaintiff had an interest, and he was constructively the holder. In *Story* on

¹ Not reported.

Bills, § 203, it is laid down that, "where a bill is originally payable to bearer, and therefore transferable by delivery only, actual or constructive delivery thereof would seem to be indispensable to complete the legal title thereto. But where the transfer is by indorsement, there an actual or constructive delivery seems now to be deemed indispensable to complete the title; and certainly must be so, if the transaction is not treated as consummated between the parties." *Lysaght v. Bryant*¹ is a strong case of constructive delivery. There, a firm consisting of two partners, being indebted to C., one of the partners (who acted as C.'s agent), with the concurrence of the other partner indorsed a bill of exchange in the name of the firm, and placed it among the securities which he held for C., but no communication of the fact was made to C. It was held that the jury were justified in finding that the bill was indorsed by the firm to C. In *Sainsbury v. Parkinson*,² which was cited upon the motion for the rule *nisi* in this case, the plaintiff merely permitted the use of his name in the action; but he had no interest in the bill, and it was never indorsed to him. The plea, therefore, that the plaintiff was not the holder, and which form of pleading appears to have arisen from the decision in *Marston v. Allen*, was answered. [PLATT, B. It seems to me that the transaction between these parties merely amounted to an agreement that the plaintiff should become the holder of a bill; but he never did become the holder. POLLOCK, C. B. Unless there was evidence that he became the holder, either actually or constructively, the verdict cannot stand.]

Bovill (*Bramwell* with him), in support of the rule. The cases of *Gill v. Lord Chesterfield* and *Sainsbury v. Parkinson* are expressly in point. Dr. Walker never ceased to be the true holder of the bill, for it never was transferred to the plaintiff. The bill was parted with for the sole purpose of allowing a copy of it to be taken. The plaintiff, therefore, never was possessed of the bill as the holder.

POLLOCK, C. B. We do not entertain much doubt as to the result of this rule. We are, perhaps, going a step further than we did in the cases just cited, and we shall therefore take a short time to consider our judgment; and, in the event of our decision being adverse to the plaintiff, it may become a question whether he ought not to be permitted to raise the point for a Court of Error by bill of exceptions.

Cur. adv. vult.

POLLOCK, C. B., now said: In this case we are of opinion that the

¹ 9 C. B. 46.

² Exch. H. T. 1852. The report of this case in 18 L. Times, 198, is not altogether accurate, as appears from a marginal note to the case of *Ancona v. Marks*, 6 H. & N. 692. — Ed.

rule should be made absolute to enter a verdict for the defendant upon the second and third issues, with liberty to the plaintiff to give up the verdict upon the other issues and to be nonsuited, if he desires the rule to be so moulded. Whether such a course will be of any service to the plaintiff, he will be advised; we do not hold out any expectation that it will.

The ground upon which we have come to our decision is that the case falls within the simple proposition of law that a person who has no interest in or possession of a bill of exchange cannot maintain an action upon the instrument. The pleas, therefore, that the bill was not indorsed to the plaintiff, and that he was not the holder of it, were established by the facts which appeared on the trial. In order to support the general proposition upon which this case turns, it will be only necessary to refer to the cases of *Gill v. Lord Chesterfield* and *Sainsbury v. Parkinson*.

It was, however, argued in this case on the part of the plaintiff, that, although he had not the actual possession of the bill, still he had the constructive possession, or the possession by his agent. But we are of opinion that neither Rickards nor Dr. Walker was the plaintiff's agent, the evidence being that the plaintiff, in truth, was their agent. There is no reason why we should refine and draw nice distinctions to give effect to a transaction, because, for some reason or other, it was determined to keep some matters out of the view of the jury, by keeping some person in the background who was not desirous of forthcoming. There was no evidence that the plaintiff had either the possession of or any interest whatever in the bill. We are, therefore, of opinion that he was not entitled to sue upon it. The rule will be absolute, subject to the alternative mentioned, if the plaintiff should think that it will be of any benefit to him. *Rule absolute.*

The plaintiff's counsel then applied for leave to tender a bill of exceptions. But the court said that they had considered the point; and, as they were of opinion that the plaintiff had no chance of success, they would not put the opposite party to the risk of incurring any further expense by allowing such a course, more especially as the plaintiff had still the opportunity of raising the question by bringing a fresh action. *Rule absolute accordingly.*¹

¹ *Machell v. Kinnear*, 1 Stark. 499; *Coates v. Kelly*, 27 Up. Can. Q. B. 284; *Coleman v. Biedman*, 7 C. B. 871; *Moore v. Maple*, 25 Ill. 341; *Harpham v. Haynes*, 30 Ill. 404 (*semble*); *Burnap v. Cook*, 32 Ill. 168 (*semble*); *Whiteford v. Burckmyer*, 1 Gill, 127; *Watson v. N. Eng. Bank*, 4 Met. 343; *Way v. Richardson*, 3 Gray, 412 (*semble*); *Hovey v. Sebring*, 24 Mich. 232; *Hocker v. Jamison*, 2 W. & S. 438, *accord*.

Epting v. Jones, 47 Ga. 622; *Marr v. Plummer*, 3 Greenl. 73; *Fisher v. Bradford*,

LAW v. PARNELL.

IN THE COMMON PLEAS, NOV. 2, 1859.

[Reported in 7 Common Bench Reports, New Series, 282.]

THIS was an action by the indorsee against the acceptor of a bill of exchange.

The declaration stated that one Thomas Burton, on the 17th of December, 1858, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him the said Thomas Burton, or to his order, £40 10s. three months after date, and the defendant accepted the same, and the said Thomas Burton indorsed the same to the plaintiff, but the defendant did not pay the same.

Pleas: first, a traverse of the acceptance; secondly, a traverse of the indorsement to the plaintiff; thirdly, that the defendant accepted the said bill and delivered it to Burton, who took and received it from the defendant, and always held it for a special purpose only, to wit, that he might get it discounted for the defendant and pay over to him the proceeds thereof on such discounting; that Burton did not get the bill discounted for the defendant, or pay over to him any of the proceeds thereof; that, except as aforesaid, there never was any consideration or value for the acceptance; that there never was any consideration for the said indorsement of the said bill to the plaintiff; and that the plaintiff always held and now holds the said bill without value, and with full knowledge and notice of the premises. Issue.

The cause was tried before Crowder, J., at the sittings in London after last Trinity term, when the following facts appeared in evidence: The plaintiff was the manager and a shareholder in an association called the Life Assurance Treasury, which carried on the business of a deposit and discount bank. Burton, who had an account with the bank, indorsed the bill in question, and handed it over to them to cover advances made to him. The plaintiff, whose duty it was as manager to hold bills and other securities on behalf of the bank, brought this action by authority of the directors.

7 Greenl. 28; *Bradford v. Bucknam*, 12 Me. 15 (*semble*); *Golder v. Foss*, 43 Me. 364; *Patten v. Moses*, 49 Me. 255; *Demuth v. Cutler*, 50 Me. 298; *Ogilby v. Wallace*, 2 Hall, 553 (*semble*), *contra*.

Conf. Franklin Bank v. Lawrence, 32 Me. 586.—ED.

On the part of the defendant, it was submitted that, the bill having been delivered to the plaintiff as manager to hold for the bank, he alone had no right to sue, but all the other shareholders should have joined in the action.

The learned judge, reserving leave to move, left the case to the jury, who returned a verdict for the plaintiff.

Laxton now moved accordingly. The plaintiff is not in a position to maintain this action. He was not indorsee of the bill. To constitute a valid indorsement, there must be a delivery of the bill with the intention to vest the property in it. [BYLES, J. In somebody.] Here, the bill was delivered to the plaintiff, not for the purpose of vesting the property in him, but in the bank, whose agent he was, and without whose indorsement he could not properly sue upon it. [ERLE, C.J. It was indorsed and delivered to the plaintiff as manager of the bank, to do with it as was customary as such manager.] It was delivered to him for a collateral purpose. In *Lloyd v. Howard*,¹ Lord Campbell says: "An indorsement requires that there shall be a delivery of the bill with an intent to make the person to whom it is indorsed the owner of the bill, a party to the bill, and transferee of the property in it. There is no indorsement, if the owner merely writes on the bill a direction to pay it to another person, and the other person gets possession without the holder's consent. Nor is there any indorsement, though the holder give that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him transferee of the property in the bill." That is fully borne out by the authority of *Marston v. Allen*, and numerous other cases. [WILLIAMS, J. In *Marston v. Allen*, it was a pure question of pleading.] In *Bell v. Lord Ingestre*, it was held that evidence that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee, for the express purpose of retiring other bills, and on the express condition that they should be retired forthwith, and that such condition had not been complied with, was admissible to support a plea traversing the indorsement. [CROWDER, J. There, as in all the other cases you cite, the bill had been obtained by fraud. Here, the bill came properly to the hands of the plaintiff as manager of the bank.] In *Emmett v. Tottenham, W.*, being the representative of a deceased holder of a bill of exchange accepted by the defendant, requested R., who had guaranteed the payment, to see it paid. R. employed the plaintiff to sue upon it in his own name, and informed W. of the fact, saying that he required the bill to deliver to the plaintiff for that pur-

¹ 15 Q. B. 995.

pose. W. thereupon gave the bill to R., who, after making a copy in his presence, gave it back, saying it would be safer in the hands of W. until it was wanted. The copy was then delivered to the plaintiff, who commenced the action. W. shortly afterwards delivered the bill to his own attorney, to take such steps as he might judge necessary and get the money; and the bill was subsequently given to the plaintiff. The defendant pleaded a denial of the indorsement, and that the plaintiff was not the holder of the bill at the commencement of the suit. It was held that, as the plaintiff had no interest in the bill, nor actual possession of it, nor any constructive possession, inasmuch as neither R. nor W. was his agent, the defendant was entitled to a verdict upon both pleas. This was a company established under the 7 & 8 Vict. c. 110, from the operation of which banking companies are by § 2 expressly excepted; consequently, all the partners ought to have joined, or the plaintiff should have shown an indorsement according to the provisions of 7 & 8 Vict. c. 113, § 22.¹ [BYLES, J. That was not necessary here, the indorsement by Burton being a blank indorsement. Where a bill is indorsed in blank, any *bona fide* holder may sue upon it.]

ERLE, C. J. I am of opinion that there ought to be no rule in this case. It is clear upon the facts stated to us that the bank gave value for the bill, and that it was indorsed and delivered to their manager by the indorser with the intention of passing the property from the indorser to the indorsees. The bill being indorsed in blank, the bank had a right to hand it over to a third person to sue upon it, without indorsing it; and therefore the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it. And the evidence showed that he had such authority. As to the cases cited, there is no doubt that, if the party has obtained the bill by fraud, or if it has come to his hands with a conditional right only, and he perverts it from the purpose for which he received it, the delivery of the bill to him with such conditional right does not constitute a valid transfer, so as to make him an indorsee. In the case of *Emmett v. Tottenham*, the plaintiff was not indorsee, neither had he possession of the bill. He had no interest in the bill: the owner of the bill never parted with it until after the commencement of the action. In *Bell v. Lord Ingestre*,

¹ Which enacts "that all bills of exchange or promissory notes made, accepted, or indorsed on behalf of the company, may be made, accepted, or indorsed (as the case may be) in any manner provided by the deed of partnership, so that they be signed by one of the managers or directors of the company, and be by him expressed to be so made, accepted, or indorsed by him on behalf of such company," &c.

the indorsement was in the nature of a conditional indorsement: the bill was handed over for the express purpose of retiring other bills. As between the plaintiff and the defendant, therefore, there was no absolute indorsement, and therefore the plaintiff had no right to sue. As to the objection that the rest of the shareholders should have been joined, or the bill specially indorsed to the plaintiff by the bank, I think that point also fails, because the blank indorsement by Burton gave the bank power to authorize their manager to sue upon the bill; and there was ample evidence that they had done so.

WILLIAMS, J. I am of the same opinion. It is plain that the bill was indorsed by a person who intended thereby to pass the property therein from himself to the bank; and that the property accordingly vested in them. Then, the bank, being the holders of a bill indorsed to them in blank, might lawfully constitute any third person the holder for the purpose of suing upon it; and the evidence showed that they did authorize the present plaintiff, their manager, to sue upon the bill on their behalf.

CROWDER, J. I am of the same opinion. There clearly was evidence from which the jury were warranted in concluding that the plaintiff had authority from the persons to whom the bill was indorsed to sue upon it. There was no fraud or suspicion of fraud on the part of the bank, or that they were not the *bona fide* holders for value; and they might well authorize their manager to sue.

BYLES, J. I am of the same opinion. To whomsoever the bill was intended to be indorsed, it clearly was perfectly indorsed. It could only have been intended to be indorsed to the plaintiff or to his principals, the bank. If it was intended to be indorsed to the plaintiff, *cadit questio*: if to the bank, inasmuch as the indorsement was in blank, it was competent to them to hand over the bill to their agent or manager for the purpose of suing upon it on their behalf.

*Rule refused.*¹

¹ *Ancona v. Marks*, 7 H. & N. 686; *Jenkins v. Tongue*, 29 L. J. Ex. 147; *Adams v. Oakes*, 6 C. & P. 70; *Allison v. Central Bank*, 4 All. (N. B.) 270; *Ross v. Tyson*, 19 Up. Can. C. P. 294; *Blake v. Walsh*, 29 Up. Can. Q. B. 541; *Orr v. Lacy*, 4 McL. 243; *Bancroft v. Paine*, 15 Ala. 834; *French v. Jarvis*, 29 Conn. 347; *Laffin v. Sherman*, 28 Ill. 391; *Lacoste v. DeArmas*, 2 La. 263; *Conrey v. Harrison*, 4 La. An. 349; *Clunas v. Gallagher*, 6 La. An. 757; *Hunt v. Stone*, 19 La. An. 526; *Zapata v. Cifreo*, 26 La. An. 87; *Klein v. Buckner*, 30 La. An. 680; *Southard v. Wilson*, 29 Me. 56; *Little v. O'Brien*, 9 Mass. 423; *Brigham v. Marean*, 7 Pick. 40; *Beekman v. Wilson*, 9 Met. 434; *Wheeler v. Johnson*, 97 Mass. 39; *Brigham v. Gurney*, 1 Mich. 349; *Fox v. Hilliard*, 35 Miss. 160; *Edgerton v. Brackett*, 11 N. H. 218; *Lovell v. Evertson*, 11 Johns. 52; *Haxton v. Bishop*, 8 Wend. 13; *Dean v. Hewitt*, 5 Wend. 257 (*semble*); *Guernsey v. Burns*, 25 Wend. 411; *Mauran v. Lamb*, 7 Cow. 174; *As*

pinwall v. Meyer, 2 Sandf. 180; Pearce v. Austin, 4 Whart. 489; Sterling v. Marietta Co., 11 S. & R. 179; Bank of America v. Senior, 11 R. I. 376; O'Brien v. Sauls, 2 Rich. 332; King v. Fleece, 7 Heisk. 273; Wells v. Schoonover, 9 Heisk. 805; Andrews v. Hoxie, 5 Tex. 171; DeCordova v. Atchison, 13 Tex. 372; Smith v. Burton, 3 Vt. 233; Boardman v. Roger, 19 Vt. 589; Hackett v. Kendall, 23 Vt. 275; Fletcher v. Fletcher, 29 Vt. 98; Ormsbee v. Kidder, 48 Vt. 361; Hyde v. Lawrence, 49 Vt. 361; Walker v. Wait, 50 Vt. 668, *accord*.

Thatcher v. Winslow, 5 Mas. 58, *contra*.

See Payne v. Flournoy, 29 Ark. 500; Best v. Nokomis Bank, 76 Ill. 608; Barker v. Prentiss, 6 Mass. 430; Howland v. Spencer, 14 N. H. 580; Southwick v. Ely, 15 N. H. 541; Comstock v. Hoag, 5 Wend. 600, where the transferee's power to sue in his own name had been revoked by the transferor.

Conf. Sherwood v. Roys, 14 Pick. 172; Royce v. Barnes, 11 Met. 276; Olcott v. Rathbone, 5 Wend. 490.

The doctrine of the principal case is not changed by a provision found in many codes, that every action shall be brought in the name of the real party in interest. Boyd v. Corbitt, 37 Mich. 52; Webb v. Morgan, 14 Mo. 428; Beattie v. Lett, 28 Mo. 596; Eaton v. Alger, 47 N. Y. 345; Hays v. Hathorn, 74 N. Y. 486; Freeman v. Falconer, 44 N. Y. Sup'r Ct. 132; White v. Stanley, 29 Oh. St. 423 (*semble*). But see Rock Bank v. Hollister, 21 Minn. 385; Killmore v. Culver, 24 Barb. 656 (*overruled*); Nichols v. Gross, 26 Oh. St. 425 *contra*, and conf. Cottle v. Cole, 20 Iowa, 482.

On the other hand, it is held, under this same code provision, that one having by assignment the beneficial interest in a bill or note may sue upon it in his own name, although the legal title still remains in the assignor. Peirce v. Cummings, 28 Iowa, 344; Williams v. Norton, 3 Kas. 295; Pease v. Rush, 2 Minn. 107; Costner v. Sumner, 2 Minn. 44; White v. Phelps, 14 Minn. 27; McLain v. Woodmeyer, 25 Mo. 364; Willey v. Gatling, 70 N. Ca. 410. But see Farwell v. Tyler, 5 Iowa, 536; Fear v. Jones, 6 Iowa, 169.

The legal title to a pledge regularly remains in the pledgor. But the indorsement of a bill or note (or the delivery of an instrument transferable without indorsement) by way of collateral security, passes the legal title to the pledgee. Accordingly, the pledgee may maintain an action upon the instrument in his own name, and in such action he is entitled to recover the full value of the paper, although greater than the amount of the debt due him from the pledgor. But he will hold the surplus for the benefit of the pledgor. Collins v. Martin, *infra*, 450; Bosanquet v. Dudman, 1 Stark. 1; Houser v. Houser, 43 Ga. 415; Jones v. Hawkins, 17 Ind. 550; Sheldon v. Middleton, 10 Iowa, 17; Matthews v. Rutherford, 7 La. An. 225; Dix v. Tully, 14 La. An. 456; La. Bank v. Gaienne, 21 La. An. 555; Bowman v. Wood, 15 Mass. 534; Paine v. Furnas, 117 Mass. 290; Lobdell v. Merchants' Bank, 33 Mich. 408; Nelson v. Wellington, 5 Bosw. 178; Spering's Appeal, 10 Barr. 235; Tarbell v. Sturtevant, 26 Vt. 513; Hilton v. Waring, 7 Wis. 492; Kinney v. Kruse, 28 Wis. 183. Payment to the pledgor is, of course, no bar to an action by the pledgee. Manhattan Co. v. Reynolds, 2 Hill, 140.

On the same principle, one holding the bill of a bankrupt for the debt of third person may prove for the whole amount, holding any surplus for the benefit of his debtor.

Even if the bankrupt signed the bill or note for the accommodation of the pledgor, the pledgee may still prove for the full amount of the instrument, but can recover, of course, no more than the amount of his debt. *Ex parte* Bloxam, 6 Ves. 449, 600 (reversing s. c. 5 Ves. 448); *Ex parte* King, Cooke Bank I. (8th ed.) 177; *Ex parte* Crossley, Cooke Bank L. (8th ed.) 177; 3 Bro. C. C. 237 s. c.; *Ex parte* Martin, 2 Rose, 87; *Ex parte* Reader, Buck, 381 (*semble*); *Ex parte* Phillips, 1 M. D. & D. 232. — ED.

ROBINSON AND CARSON v. CRANDALL AND VINCENT.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1832.

[Reported in 9 Wendell, 425.]

THIS was an action of *assumpsit*, tried at the Allegany circuit, in October, 1829, before the Hon. Addison Gardiner, one of the circuit judges.

The plaintiffs declared as the bearers of two promissory notes for about \$197, made by the defendants, bearing date in 1826, payable to Hosea Wetherly, or bearer, and proved the signatures of the defendants. The defendants proved that in 1828 Robinson, one of the plaintiffs, admitted that the payee of the note, who had resided in Pennsylvania, had died there; that himself and another person were the administrators of his estate; that the payee had not left property sufficient to pay his funeral charges, except notes of about \$100 or more, against the defendants, and a small note against one Wright; and that he had come from Pennsylvania into this State to collect those notes. The defendant objected to a recovery, on the ground that no assignment of the notes having been proved, and it having been shown that the payee was the holder of them at the time of his death, neither the administrators of his estate appointed in Pennsylvania, nor any other person, had the right to maintain a suit upon them. The judge charged the jury that possession of the notes alone entitled the holders to maintain the suit, unless the jury should be of opinion that such possession was fraudulently obtained; in which case they ought to find a verdict for the defendants. The jury found for the plaintiffs. The defendants moved for a new trial.

A. Herrick, for the defendants.

G. Miles, for the plaintiffs.

By the Court, SUTHERLAND, J. The motion for a new trial must be denied. The jury have found that the plaintiffs came honestly by the notes on which the suit is brought; that they were not obtained by them fraudulently. That question was distinctly submitted to them by the judge, and they were charged to find for the defendants, if they believed the plaintiffs obtained the possession of the notes fraudulently.

The notes being payable to bearer, and the payee having died in Pennsylvania, admitting the plaintiffs to have been his administrators there, and in that manner to have obtained the possession of the notes, I see no legal objection to their maintaining an action upon them in their own names as bearers. As administrators they could not sue here.

Letters testamentary, or of administration granted abroad, give no authority to sue here; we take no notice of them. 1 Johns. Ch. R. 156; 6 Ibid., 353; 7 Cowen, 68, and cases there cited. But being the real owners of the notes, they had a right to declare as bearers and recover in that character. A mere agent, having a note of his principal, payable to bearer, may sue on it in his own name, and it does not lie with the defendant to object the plaintiff's want of interest. 7 Cowen, 174, and cases there cited. It was not pretended in this case that the defendants had any set-off or other defence as against the payee.

*Motion for new trial denied.*¹

GAGE v. KENDALL.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER,
1836.

[*Reported in 15 Wendell, 640.*]

ERROR from the Cortland Common Pleas. Kendall declared in the court below on a promissory note made by Gage, payable to William Castle, or bearer. The defendant pleaded the general issue, and gave notice with his plea that he would prove, on the trial, that the plaintiff, at the commencement of the suit, had no title to or interest in the note declared on, but had transferred the same to one Shankland, who was the owner and holder thereof; and that the suit was commenced without the knowledge, consent, or authority of the plaintiff. On the trial, the defendant offered to prove the facts set forth in his notice. The evidence was objected to, and rejected by the court. The defendant accepted. The plaintiff obtained a verdict, upon which judgment was entered. The defendant sued out a writ of error.

J. A. Spencer, for the plaintiff in error.

S. Stevens, for the defendant in error.

PER CURIAM. The question is, whether the fact that the holder and owner of a negotiable note has prosecuted such note in the name of a stranger, without his knowledge or consent, is a bar to a recovery in the name of such nominal plaintiff.

Perhaps this question cannot be better answered than it has been by this court, in *Lovell v. Evertson*.² The note being indorsed in

¹ *Barrett v. Barrett*, 8 Greenl. 353; *Lucas v. Byrne*, 35 Md. 485, *accord*.

Kirkpatrick v. Taylor, 10 Rich. 393, *contra*.

See also, to the same effect as the principal case, *Gage v. Johnson*, 20 Me. 437; *Brooks v. Floyd*, 2 McC. 364. — ED.

² 11 Johns. R. 52.

blank (in this case, payable to bearer), the owner had a right to fill it up with what name he pleased, and the person whose name was so inserted would be deemed, on record, as the legal owner; and, if not so in fact, he could sue as trustee for the persons having the real interest. But the defendant could have no concern with that question. He was responsible to the person whose name was so inserted in the blank indorsement. It is true, as contended for by the plaintiff in error, that suits should be brought by the persons having the legal interest in contracts; but, in the case of negotiable paper, a suit may be brought in the name of a person having no interest in the contract. He may sue as trustee for those who are interested. But why should the defendant give himself the trouble to investigate the plaintiff's title? He owes the money to some one: in this case, he offered to show that he owed it to Mr. Shankland, who had brought the suit. It is not a case, therefore, of *mala fide* possession. A recovery in this case in the name of the present plaintiff might be pleaded, with proper averments, in bar of a new suit in favor of any other person. The defendant is not deprived, in such a suit, of any defence which he may have as against the real owner. There is, in principle, no objection to a suit on a promissory note in the name of a nominal plaintiff; nor is there any authority against it. The cases referred to do not sustain the defence. In the case of *Olcott v. Rathbone*,¹ it was said the owner of a promissory note, indorsed in blank, can make whom he pleases the holder. The difficulty in that case was, that it did not appear that the owner had assigned the note to the plaintiff, or had directed that suit. There is no such difficulty here: the defendant's offer was to show that the true owner had himself brought the suit. The case of *Waggoner v. Colvin*,² when properly considered, is not an authority for the plaintiff in error. That case came up on demurrer. The defendant pleaded that, before the commencement of the suit, the plaintiff had indorsed the note to Stilwell and others, and delivered the note to them, who were the true and lawful owners, and possessors of the note. The court said that the plea was good, because it showed the legal title out of the plaintiff; but added that, if the suit was brought in the name of the plaintiff for the benefit of the owners, that fact should be replied, and it would be a good answer to the plea, — distinctly asserting that a suit may be brought in the name of a person having no interest in the note, if for the benefit and by the direction of the owner. The court below decided correctly, and their judgment must be affirmed.

*Judgment affirmed.*³

¹ 5 Wend. 494.

² 11 Wend. 27.

³ *Hartwell v. McBeth*, 1 Harringt. 363; *Temple v. Hays*, Morris (Iowa), 9; *Grey v. Phillips*, Morris (Iowa), 430; *Lewis v. Hodgdon*, 17 Me. 267; *Gray v. Wood*, 2

CHARLES DEVLIN, APPELLANT, v. JAMES B. BRADY,
RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1867.

[Reported in 36 New York Reports, 531.]

DAVIES, C. J. This action is brought against the maker to recover the amount of a promissory note for \$3,000, dated May 12, 1857.¹ The note in controversy was made payable to the order of the maker, and indorsed by one George Mountjoy and the plaintiff. It appeared that, two days after the date of the note, Devlin advanced to Mountjoy upon it the sum of \$2,650, and subsequently paid him the balance. That Devlin, having the note in his possession and not indorsed by him, applied to the Bowery Bank for its discount, and it was left with the president of the bank; Devlin indorsing the same with the understanding that he might draw against it, which he did on the 14th of May, 1857, by a check to the order of Mountjoy for \$2,650. That the note was discounted on the 16th of June, and proceeds passed to Devlin's credit and protested; and on the 17th of July Devlin took it up by his check for the amount thereof and protest.

Assume that this suit was brought by Mountjoy, can it be for a moment contended that he could recover? The consideration of the note upon the state of facts we are bound, by the verdict of the jury, to assume to be true, was that Mountjoy could and would and did undertake, in consideration of this note, to use his influence with Taylor, the street commissioner, to violate the corporate ordinances, and induce him to pay Brady the sum of \$23,000 or \$24,000, before he

Har. & J. 328; Hodges v. Holland, 19 Pick. 43; Sigourney v. Severy, 4 Cush. 176; Drury v. Vannevar, 5 Cush. 442; Stone v. Hubbard, 7 Cush. 595; Waggoner v. Colvin, 11 Wend. 27 (*semble*); Austin v. Birchard, 31 Vt. 589, *accord*.

Thompson v. Bell, 3 E. & B. 236, 247 (*semble*); Leavitt v. Cowles, 2 McL. 491; Johnson v. English, 1 Stew. 169; Hunt v. Stewart, 7 Ala. 525; Bullock v. Ogburn, 13 Ala. 346; Block v. Walker, 2 Ark. 4; Jordan v. Thornton, 7 Ark. 224; Roberts v. Jacks, 31 Ark. 597; Curtis v. Bemis, 26 Conn. 1; Kyle v. Thompson, 3 Ill. 432; Campbell v. Humphries, 3 Ill. 478; Thompson v. Coquillard, 3 Blackf. 437; Sater v. Hendershott, Morris (Iowa), 118 (*semble*); Neyfong v. Wells, Hardin, 561; Wilson v. Ryan, 7 J. J. Marsh. 350; Bovie v. Duvall, 1 G. & J. 175; Tucker v. Tucker, 119 Mass. 79 (*semble*); Lake v. Hastings, 24 Miss. 490; Jones v. Martins, 13 Pa. 614 (*semble*); Smyth v. Carden, 1 Swan, 28; Cardwell v. Tennison, 10 Humph. 446, *contra*.

Conf. Bragg v. Greenleaf, 14 Me. 395; Mosher v. Allen, 16 Mass. 451.

¹ The report of the case has been abbreviated by the omission of detailed statements of the testimony given at the trial. — ED.

was legally entitled to receive the same. It is too well settled to need the citation of an authority, that a recovery could not be had upon a note by the party to the transaction given under such circumstances. If there be any doubt, it is conclusively settled by authority. 2 Kent's Com 466; *Nichols v. Mudgett*,¹ *Meacham v. Dow*,² *Sharp v. Wright*,³ *Wall v. Charlick*,⁴ *Harris v. Roof*,⁵ *Rose v. Truax*,⁶ *Gray v. Hook*.⁷ It is a recognized and firmly established maxim in the law that *ex turpi contractu actio non oritur*; and no person, so far back as the feudal ages, was permitted by law to stipulate for iniquity. (Fitz. Ab., tit. Obligation, pl. 13.)

It would seem, therefore, that Mountjoy could not have maintained any action against Brady upon this note, and the judge correctly refused to charge the jury that the agreement alleged in the answer and established by the testimony was not illegal.

It remains to consider whether Devlin acquired any better or greater rights in the note than those of Mountjoy. The jury have found that Devlin knew of the consideration for which the note was given,—nay, even advised the making of the arrangement with Mountjoy; and there is ground for the inference that Mountjoy was used but as the instrument of Taylor, and that Devlin, in fact, discounted the note for Taylor. If this be so, then with the knowledge of Devlin the note was made, and the proceeds were to be used to induce Taylor to violate his duty as a public officer, by paying to Brady the amount of his contract before it was legally due. If this be the correct theory, it is needless to say that Devlin could not recover back money paid for such a purpose. On the assumption, therefore, that Devlin had never parted with the note, upon the facts found by the jury he could not have recovered upon the note, standing in no better position than Mountjoy himself.

It remains to be considered whether his condition was improved by the transfer to, and the discount of, the note by the Bowery Bank; and this question is sharply presented by the second and third requests made to the court to charge, and which were refused and an exception taken. They are in these words:—

2. That if the Bowery Bank became the holders of the note before the maturity and for value, and in good faith, the plaintiff is entitled to stand in the shoes of the bank, and entitled to recover upon the note, although he knew the consideration of the note at the time it was transferred to the bank.

¹ 32 Ver. 546.

³ 35 Barb. 236.

⁵ 10 Barb. 489.

⁷ 4 Comst. 449.

² 32 Ver. 731.

⁴ N. Y. Leg. Obs., July, 1850, p. 230.

⁶ 21 Barb. 361.

3. If Devlin procured the note to be discounted for Mountjoy at the Bowery Bank, and the bank took it in good faith, and for value before maturity, Devlin is entitled to recover on it in the same manner as the bank, although he knew at the time of the original transfer to the bank that the consideration of the note was as is alleged by Brady.

Both these requests assume the knowledge of Devlin of the illegality of the note, and that it was given for the purpose as stated by Brady. It is not perceived how Devlin's dealings with the Bowery Bank, in respect to this note, gave him any better or greater title to it than he possessed before it was delivered to the bank. He procured the money from the bank on the strength of his indorsement, and when the note was dishonored he returned the amount so received with the fee of protest of the note. Such payment but discharged his legal liability to the bank, but gave him no greater rights as against the other parties on the note than he had before. Conceding, as we may, that the bank might have collected the note, or that any one subrogated to the rights of the bank might also have done so, it does not follow that Devlin could. In what sense was he subrogated to any right of the bank? The payment by Devlin of the money which he borrowed of the bank on the credit of this note, and his indorsement thereof, remitted him to his original rights upon the note. Such payment cancelled his indorsement and all liability to the bank, and left the note in his hands precisely as if he had never parted with it. The court did not err, therefore, in refusing to charge as requested.

We do not perceive any error in any of the rulings of the circuit, and consequently the judgment must be affirmed. *Affirmed.*¹

¹ *Lancey v. Clark*, 64 N. Y. 209; *Hutchinson v. Munro*, 8 Up. Can. Q. B. 103, *accord*. See also *infra*, 691, 692, n. 3.

Conf. *Merrills v. Swift*, 18 Conn. 257; *Dodge v. Brown*, 113 Mass. 323; *Davis v. Morgan*, 64 N. Ca. 570; *Horton v. Manning*, 37 Tex. 23; *Burton v. Slaughter*, 26 Gratt. 914.

A payee who has indorsed a note for the accommodation of the maker may take up the note and bring an action thereon as payee against the maker. *Fenn v. Dugdale*, 40 Mo. 63; and in such an action he may recover the face value of the note, although he paid less, if a subsequent party was entitled to the face value. *Fowler v. Strickland*, 107 Mass. 552. But see *Bethune v. McCrary*, 8 Ga. 114, *contra*.

Similarly, an indorser who has not been charged by the holder may take up a bill and sue any prior party who was liable to the holder. *Ellsworth v. Brewer*, 11 Pick. 316; *Pinney v. Gregory*, 102 Mass. 186.—ED.

Mode of Transfer — (continued).

(b) INDORSEMENT.

SMITH AND ANOTHER v. PICKERING.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JUNE 7, 1791.

[Reported in *Peake*, 50.]

ASSUMPSIT by the indorsees of a bill of exchange against the acceptor. The bill was drawn by Richardson and Hill on the defendant, and was payable to the order of the drawers. They delivered it to the plaintiff for a valuable consideration, but forgot to indorse it. Afterwards, they became bankrupts, and then Richardson made an indorsement on the bill.

LORD KENYON. I am clearly of opinion that this is a good indorsement by the bankrupts. The plaintiffs had the equitable claim, and it is clear that nothing passes to the assignees of a bankrupt but property that really and beneficially belongs to the bankrupt. Though the bankrupts had the legal estate in this bill, yet it was unattended by any interest, and they were bound to indorse it.

Verdict for plaintiff.¹

PREVÔT v. ABBOTT.

IN THE COMMON PLEAS, NOV. 22, 1814.

[Reported in 5 *Taunton*, 786.]

THE plaintiff declared on a bill of exchange drawn by the defendant, requiring B. Skinner, ninety days after date, to pay to the defendant or his order £27 5s. 6d., and averred that the defendant delivered the bill to the plaintiff, and averred an acceptance, presentment for payment, and dishonor. After verdict for the plaintiff, *Vaughan*, Serjt., obtained a rule *nisi* in arrest of judgment, upon the ground that no indorsement by the defendant was averred, and that the bill could not

¹ *Ex parte Greening*, 13 Ves. 206; *Anon.*, 1 Camp. 492, n.; *Ex parte Mowbray*, 1 Jac. & W. 428; *Ex parte Brown*, 1 Gl. & J. 407; *Ex parte Rhodes*, 3 Mont. & Ayr 217, *accord.* — ED.

pass without indorsement by mere delivery; and on this day no cause being shown he made the

*Rule absolute.*¹

WATKINS v. MAULE.

IN CHANCERY, BEFORE SIR THOMAS PLUMMER, M. R., NOVEMBER 30, 1820.

[*Reported in 2 Jacob & Walker, 237.*]

SIR ROBERT SALUSBURY being indebted on his private account, and also as a partner in the banking-house of Sir Robert Salusbury & Co., to Messrs. Down, Thornton, & Co., in March, 1812, executed a conveyance to them of certain real estates in the county of Monmouth, by way of mortgage, with a power of sale to secure the debt due on his private account, and then, upon trust, to apply the produce in liquidation of the partnership debt. Messrs. Down, Thornton, & Co. afterwards agreed to make further advances to Sir Robert Salusbury & Co., on condition of having promissory notes to the amount deposited, by way of security. Accordingly, on the 12th May, 1813, Sir Robert Salusbury & Co. remitted, without indorsement, a promissory note for £2,000, dated the 17th April, 1813, payable at twelve months to Sir Robert Salusbury, or order, for whose accommodation it had been drawn and signed, without consideration, by Benjamin Hall, Esq. Credit was given by Messrs. Down, Thornton, & Co. to Sir Robert Salusbury & Co. for the amount, which was afterwards drawn for and received by them. On the note becoming due, Messrs. Down, Thornton, & Co. presented it at Messrs. Pybus & Co.'s, where it was made payable, who paid it out of effects of Hall's in their hands. Hall remonstrated with Messrs. Down, Thornton, & Co. on their having

¹ Pease v. Hirst, 10 B. & C. 122; Alday v. Jamison, 3 Port. 112; Biscoe v. Sneed, 11 Ark. 104; Freeman v. Perry, 22 Conn. 617; Hooker v. Gallagher, 6 Fla. 351; Nevius v. Ravenscroft, 67 Ill. 496; Scott v. McDougall, 14 La. An. 309; Woodbury v. Woodbury, 47 N. H. 11; Nelson v. Marley, 2 Yerg. 576, *accord*.

See also Sturges v. Miller, 80 Ill. 241; Elliott v. Armstrong, 2 Blackf. 198; Lewis v. Hathman, 7 Ind. 585; McCrum v. Corby, 11 Kans. 464; Hadden v. Rodkey, 17 Kans. 429; Titcomb v. Thomas, 5 Greenl. 282; Calder v. Billington, 15 Me. 398; Bradley v. Hunt, 5 G. & J. 54; Jones v. Witter, 13 Mass. 304; Patterson v. Cave, 61 Mo. 439; Boody v. Bartlett, 42 N. H. 558; Hedges v. Sealy, 9 Barb. 214; Freund v. Importers' Bank, 6 Th. & C. 236; Smith v. Lurry, 3 Tenn. 246; Hill v. Crosby, 2 Humph. 545; Ingram v. Morgan, 4 Humph. 66.

A note in this form: "Due the bearer," &c., "which I promise to pay to A., or order," is transferable by indorsement, and not by delivery. Cock v. Fellows, 1 Johns. 143.

The Sovereign may transfer a bill or note without indorsement. Lambert v. Taylor, 4 B. & C. 138. Conf. United States v. Buford, 3 Pet. 30. — ED.

procured payment of the note, stating that, at the time when he signed it, he had been assured by Sir Robert Salusbury that he would not be called upon for payment, unless a deficiency should arise upon the sale of his estates. Messrs. Down, Thornton, & Co. yielded to these representations, repaid the £2,000, and took back the note, upon an understanding that Hall should pay them the amount, in the event of the produce of the sale of Sir Robert Salusbury's estates proving insufficient to satisfy their debt.

In December, 1815, Sir Robert Salusbury became a bankrupt; and Edward Down, a partner in the house of Down, Thornton, & Co., was chosen his assignee. The estates were sold; and, after the application of the produce in payment of the debt of Messrs. Down, Thornton, & Co., there remained a considerable balance due to them from Sir Robert Salusbury, and from the partnership of Sir Robert Salusbury & Co. Down, Thornton, & Co. then applied to Hall for payment of the note, and commenced an action against him upon it, when he offered to give a bond for the amount, which offer was acceded to, and the proceedings in the action were stopped; but before the execution of the bond Hall died suddenly. A creditor's suit having been instituted for the administration of his estate, and a decree pronounced, Messrs. Down, Thornton, & Co. carried in a claim for the amount of the note in question, and interest, which was rejected by the Master. Edward Down afterwards, in July, 1820, took out letters of administration to Sir Robert Salusbury, who had died intestate in 1817. He then indorsed the note to himself and partner; but the Master was still of opinion against their claim, and they now petitioned for leave to file exceptions to his report, stating, that they had not been able to carry in objections in the usual course, from not having had notice of the time when it was prepared and signed. The petitioners stated that they had not discovered the want of indorsement on the note till some time after the death of Sir Robert Salusbury; and it was said, on the other side, that that fact was also unknown to Hall and his solicitors, at the time the action mentioned above was brought against him.

Mr. Horne, Mr. Shadwell, and Mr. Pemberton, in support of the petition.

The promissory note on which the claim is founded was transferred for valuable consideration before the bankruptcy; and, therefore, the bankrupt, though the indorsement was forgotten, retained no interest in it: with respect to the note, he was in the situation of a trustee, and nothing passed to his assignees. Hence, an indorsement by him after the bankruptcy would have been good (*Smith v. Pickering, Arden v. Watkins*);¹ and he might have been compelled to complete

¹ 3 East, 817, and see *Ex parte Greening*, 13 Ves. 206; *Ex parte Mowbray*, 1 Jar & W. 428.

the security, by performing that act. The indorsement by his administrator is equally valid. *Rawlinson v. Stone*. And it is no objection that the administration was taken out for this particular purpose, for it was a duty which the bankrupt was bound to perform. Being in the hands of holders for valuable consideration, the circumstance of its being an accommodation note does not affect them. Independently of this, Hall's subsequent promise to pay is sufficient proof of the debt.

Mr. Heald and *Mr. Cooper*, on the other side, waived any objection to the form of the application, but observed that the circumstances appeared only on the affidavits of the petitioners, which are not admissible when the debt is contested,¹ and which had not been answered or objected to, as the Master's opinion was against them, upon their own statement; they therefore desired that the affidavits might not be considered to be conclusive as to the facts. They then contended: 1st, that the consideration being paid to the partnership, and not to Sir Robert Salusbury himself, did not bind the accommodation drawer; 2dly, that the indorsement being made six years after the note became due, after the death of the bankrupt, by an administrator, who was himself one of the holders, was not operative. A party taking any negotiable instrument after it is due takes it accompanied with all the equities, and with all the infirmities to which it was subject in the hands of the indorser. *Boehm v. Starling*,² *Roberts v. Eden*,³ *Goggerly v. Cuthbert*,⁴ *Crossley v. Ham*. And, therefore, the character of holders for valuable consideration does not put the petitioners in a better situation, as against Hall, than the bankrupt would have been in, if he had retained it; and he could not have brought an action. There was no way of compelling Sir Robert Salusbury to indorse the note before his bankruptcy; and afterwards he could not have been compelled without the assent of his assignees. The indorsement was the voluntary act of the administrator, for the purpose of making himself a creditor. The promise said to have been made afterwards cannot be relied on, having been without consideration, and under the idea that the indorsement was regular; besides being void, under the Statute of Frauds, as a promise to pay the debt of another.

THE MASTER OF THE ROLLS. In the shape in which this comes before the court, I do not think that I can refuse, if it is insisted on, to send it back to the Master for a further inquiry into the facts. If the parties opposing the allowance of the petitioners' debt thought it unnecessary to controvert their statement, from a reliance on the legal consequences being against the claim; if that was their reason

¹ See *Fladong v. Winter*, 19 Ves. 196.

² 7 T. R. 423.

³ 1 Bos. & Pul. 398.

⁴ 2 N. R. 170.

for not disputing the facts, which they now think they can succeed in disproving, I think it is fair that they should have an opportunity of so doing ; but, at present, we must suppose the circumstances to have been as they are now represented.

The note was dated 17th April, 1813, payable to Sir Robert Salusbury, or order, twelve months after, and was remitted to the London banking-house of the petitioners in May, 1813. Upon receiving it, they gave credit to Sir Robert Salusbury & Co. for the amount, the whole of which was afterwards drawn for and paid. Though this was not a payment personally and individually to Sir Robert Salusbury, yet it was a consideration moving towards him, being a payment to a house in which he was a partner, he having transmitted it for the purpose of obtaining the advance, and being benefited by it jointly with the other partners. Upon its becoming due, an application is made to Pybus & Co., who pay it. Shortly after, Hall learning this, a meeting takes place between him and the petitioners ; but nothing is said about the want of indorsement : he does not dispute the payment on that ground, but because it was given originally only as a guarantee, thus admitting that in other respects there was no objection to it. He was then liable to pay, as I take it for granted he knew the purpose for which the note was to be used, and the indorsement might have been added at any time. There was, therefore, an admission on his part of his liability, it being understood that he was only to be resorted to in the event of a deficiency. On the footing of these communications, and in reliance upon him, the money was actually repaid by the petitioners in a manner very honorable to themselves. It is said that this was only an agreement to pay the debt of another ; but, at the time he promised, he had actually been made responsible. He could not have got back the money without an action, and, in consideration for their returning it to him, he makes this promise : then, is not that sufficient to bind him ?

Salusbury & Co. were unable to pay, and afterwards became bankrupts. Proceedings were then commenced against Hall, and, if he conceived that he could for any reason resist the action, he knew the proper mode of defending it ; but, instead of that, the action is stopped by his undertaking to give a bond, and the costs were paid by him. He did not therefore mean to question the propriety of the action, but recognized the justice of it. The circumstance that prevented the bond from being executed in his lifetime was that it was intended to include the interest that was due ; and he died before the interest was calculated.

After all this, difficulties are now made. It is said that the indorsement is bad, because it is by an administrator, and made six years after

the note was due, and after the bankruptcy of the party who transferred it. But is there any difference between an indorsement by the party himself and one by his personal representative? There is no doubt that, when the note was remitted, it was intended that it should be a security; and, when a note is handed over for valuable consideration, the indorsement is a mere form: the transfer for consideration is the substance; it creates an equitable right, and entitles the party to call for the form. The other is bound to do that formal act, in order to substantiate the right of the party to whom he has transferred it; and, as he is bound to do it, the indorsement by his representative is undoubtedly as good as if it was by himself. The six years that had elapsed does not affect the validity of the indorsement: the transaction in 1817 with Hall was enough to take it out of the Statute of Limitations.

Nor is it of any importance that the indorsement was by a person holding the double character of administrator and indorsee, because it was a mere form, not passing any thing substantial. If a note or bill is transferred without indorsement for valuable consideration before the bankruptcy, the holder may afterwards call on the bankrupt or his assignees to indorse it, which, according to *Smith v. Pickering* and the other cases, will make it as valid as if it had been indorsed at first; for the equitable right attaches at the time of the transfer, and the assignees succeed to all the equitable rights and liabilities of the bankrupt. The act of the bankrupt could not have the effect of passing any substantial interest; but it is operative in this instance, because it is only a form necessary to give validity to a security that was previously good in substance.

The cases that have been cited to establish the position, that the indorsee of a note, after it is due, takes it subject to the equities affecting it in the hands of the indorser, do not apply here; for that is only true when the note is due at the time it is first taken. When that is the first transaction, he then takes it with a degree of suspicion attached to it. But that has no application to a case where the transfer was before the note became due, and where the equitable right had therefore passed before the day of payment.¹ Its being an accommodation note makes no difference: it is equally good as between the holder for valuable consideration and the drawer. I am clearly of opinion that the indorsement was sufficient to give effect to the antecedent right that vested at the time when the consideration was paid; and that the promise made afterwards by Hall, for which there was abundant consideration, is binding on his personal representative.

¹ The indorsement has relation back to the time of the delivery of the bill. See *Anon.*, 1 Campb. 492, n.

Supposing the facts to be as they are stated, his assets are liable; but, if there is any dispute about the truth of the statements, all that can be done is to refer it back to the Master to inquire into the petitioners' claim.¹

HARROP, APPELLANT, v. FISHER, RESPONDENT.

IN THE COMMON PLEAS, MAY 3, 1861.

[Reported in 9 Weekly Reporter, 667.²]

THIS was an appeal from the decision of the judge of the County Court of Sheffield. The action was on a bill of exchange, payable to the order of the drawer, Johnson. One Ratcliffe discounted the bill for Johnson, paying him full consideration. Johnson, however, omitted to indorse it. The acceptor on being applied to refused to pay, because Johnson had not indorsed it. Johnson had gone to America; and Ratcliffe indorsed the bill, *per proc.*, for Johnson to the plaintiff. The judge of the County Court held that there was evidence from which he could infer that Johnson authorized Ratcliffe to put Johnson's name on the bill, and found for the plaintiff.

T. Jones, for the appellant, the defendant below. Does the law give the authority? The contrary is proved by the numerous bills in chancery by which to remedy the defect. The plaintiff might have brought an action in the name of Johnson. *Ex parte Greening*³ shows that a bankrupt or his assignees may be compelled to indorse a bill. Equity had jurisdiction, because the title at law was defective. *Chitty on Bills*; *Moxon v. Pulling*. If the law will imply the authority, it will imply it also in the case of a bill of lading.

Quain, for the respondent. Under the circumstances, there was evidence of an authority to indorse. First, Johnson intended to pass the property. He could not do so without indorsing. He gave, therefore, all the authority necessary to pass it. Ratcliffe is either a deposittee or an agent, or he has bought the bill out and out. It has been suggested that an action might be brought in Johnson's name. If there is evidence of authority to do that, surely there is evidence of authority to indorse. In *Byles on Bills*, it is said: "No particular form of appointment is necessary to enable the agent to draw, accept, or indorse bills, so as to charge his principal. He may be specially appointed for this purpose, or may derive his power from some general or implied

¹ *Malbon v. Southard*, 36 Me. 147, *accord*.

See, to the same effect, *Guptill v. Horne*, 63 Me. 405, where a married woman indorsed by her maiden name a note, payable to her order, which she had transferred by delivery to a third person before her marriage. — ED.

² 10 C. B. N. S. 196, s. c. — ED.

³ 13 Ves. 206.

authority. Subsequent recognition of an agent's act is equivalent to previous authority; and provided the agent, when he acted, assumed to act as agent." As indorsement is essential to vest the property, there is evidence to authorize Ratcliffe to put it on. In *Byles on Bills*, citing from the judgment of Tindal, C. J., in *Prescott v. Flinn*,¹ it is said, "It may be admitted (says Tindal, C. J.) that an authority to draw does not import in itself an authority to indorse bills; but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine, on the whole of the evidence, whether an authority to indorse existed or not."

T. Jones was not heard in reply.

ERLE, C. J. We are all of opinion that the defendant is entitled to succeed. The intention was that the property should pass; but the act done is putting an indorsement on the bill, and it carries so many consequences with it to hold that parties may put on what was omitted by inadvertence, that, holding that lawful, I think, would be introducing what would be dangerous.

WILLES, J. I am of the same opinion.

BYLES, J. I am of the same opinion. The law is laid down by Mr. Justice Story, in his *Treatise on Bills*, § 201: "If the bill is originally payable to a person or his order, then it is properly transferable by indorsement. We say properly transferable, because in no other way will the transfer convey the legal title to the holder, so that he can, at law, hold the other parties liable to him *ex directo*, whatever may be his remedy in equity. If there be an assignment thereof, without an indorsement, the holder will thereby acquire the same rights only as he would acquire upon an assignment of a bill not negotiable. If by mistake, or accident, or fraud, a bill has been omitted to be indorsed upon a transfer, when it was intended that it should be, the party may be compelled by a court of equity to make the indorsement; and, if he afterwards becomes bankrupt, that will not vary his right or duty to make it; and, if he should die, his executor or administrator will be compellable, in like manner, to make it." In *Rose v. Sims*,² there was an express promise in writing to indorse the bill, and yet Parke, J., says: "This is not a case of mutual credit within the Bankrupt Act; it is merely a case where a cause of action arises for the non-performance of a contract;" and Taunton, J., says: "Immediately upon that failure, a right of action accrued to the plaintiff, but not a debt."

KEATING, J. I am of the same opinion. I think there was no evidence of any authority to indorse that bill.

Judgment for the appellant, without costs.

¹ 9 Bing. 22.

² 1 B. & Ad. 521.

EDGE v. BUMFORD.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 16, 1862.

[Reported in 31 *Law Journal Reports*, 805.¹]

PHILEMON ROBERTS, in March, 1861, was indebted to Messrs. Edge and Barlow, the plaintiffs, upwards of £40, for goods sold and delivered.

In part payment of the plaintiffs' demand, he gave them a bill of exchange for £40, drawn by him and accepted by John Bumford, the defendant, and made payable at a certain bank in London to his own order.

Upon receipt of the bill, the plaintiffs found that it had not been indorsed by P. Roberts, and they returned it to him with a request that he would indorse it.

P. Roberts omitted to indorse the bill; and, when the plaintiffs applied for it a few days afterwards, he informed them that he had burnt it.

On the 10th of April following, P. Roberts was declared a bankrupt, and the defendant, as acceptor, refused to pay any thing in respect of the bill, which he admitted had been destroyed.

The plaintiffs then filed this bill, offering to indemnify the defendant against any demand, the bill asking that the defendant, as the acceptor of the bill of exchange, might pay the sum of £40, together with interest from the day when the same ought to have been paid.

Mr. Selwyn and *Mr. Eddis*, for the plaintiffs. By sending the bill, the drawer agreed to give security for the debt, with the acceptor as surety. The defendant when he accepted the bill made himself liable in equity to pay the amount. It was the want of the indorsement of the drawer only that made the bill not available at law: it would not, however, prevent this court from giving relief against the defendant. *Hansard v. Robinson*, *Watkins v. Maule*, *Wright v. Lord Maidstone*; ² *Byles on Bills*, 132.

Mr. Follett and *Mr. W. Morris*, for the defendant, were not heard.

THE MASTER OF THE ROLLS. It is clear this bill cannot be maintained. The only ground for supposing that it could be sustained, and that there might be relief in equity, is that there is no relief at law, which has been supposed by many persons to be a head of equity; but it is a mistake so to suppose. There are many cases in which there can

¹ 31 *Beav.* 247, s. c. — *Ed.*

² 1 *Kay & J.* 701; s. c. 24 *Law J. Rep.* (N. S.) *Chanc.* 423

be no relief in either branch. But the case here is of the most singular description, because, assuming the proposition laid down by Mr. Justice Byles in his work on Bills to be correct, which is stated *obiter* in the case of *Watkins v. Maule*, that a bill may be sustained to compel a person to indorse a bill of exchange, and there may be a case of an agreement for value where that is undertaken, — and it is possible the court may grant an injunction to prevent him parting with it to any other than the plaintiff, and to compel him to indorse it over to the plaintiff, — assuming that to be done, the only thing established here is that a bill might lie against P. Roberts to compel him to indorse the bill; but, as that is of no value, they file a bill against the acceptor to make him pay it. There is no indorsement at all of any sort or description. P. Roberts draws a bill of exchange against the defendant, John Bumford; and thereupon the drawer of the bill of exchange gives it to the plaintiff. The plaintiff says this is of no use, and returns it, and requires him to indorse it. He says, I shall not indorse it, and, as you have returned it to me, I shall destroy it; and he destroys it; and, instead of coming against P. Roberts to make any thing of him, he applies to the acceptor, between whom and the plaintiff there is no privity at all, and says, “Pay me that bill,” it being admitted there is no remedy at law. It is clear there is none in equity; and, if the court entertained bills of this description in respect of bills of exchange, it would have enough to do. In *Watkins v. Maule*, the only question was whether there was a debt proved, and the passage referred to says the indorsement by the legal personal representative is as good as the indorsement by the drawer, and thereupon it admits it as a debt, and it says, *obiter*, you may come into equity for form’s sake; but it never laid down such a proposition as that which would be necessary to maintain this bill. It must be dismissed, with costs.¹

WHISTLER v. FORSTER.

IN THE COMMON PLEAS, APRIL 24, 1863.

[Reported in 14 Common Bench Reports, New Series, 248.]

THIS was an action by the endorsee against the maker of a check, £97 10s., drawn by the defendant, payable to A. S. Griffiths & Co., or order, and indorsed by A. S. Griffiths & Co. to the plaintiff.

¹ Conf. *Cohea v. Bacon*, 20 Miss. 516. — ED.

The defendant traversed the making and indorsement of the check, and also pleaded that he the defendant was induced to make the check by and through the fraud of Griffiths & Co., and that there never was any value or consideration for the indorsement of the same to the plaintiff, or for his holding the same; and that he had notice of the premises before and when the same was first indorsed to him, and took the same from Griffiths & Co. with such notice. Issue thereon.

The cause was tried before Willes, J., at the sittings in London after last Hilary term, when the following facts appeared in evidence: The check in question, which bore a 1*l.* stamp, was drawn by the defendant some day before the 3d of October, 1862, and handed by him to Griffiths, upon an understanding that it was not to be presented for payment until the 4th, and an undertaking by Griffiths to furnish the defendant with funds to meet it early on the morning of that day, which, however, he failed to perform. Griffiths, on the third, gave the check to the plaintiff for value, but did not then indorse it. At the time he received the check, the plaintiff had no notice of the way in which Griffiths had obtained it from the defendant, but before he obtained the indorsement of Griffiths he had such notice.

On the part of the defendant, it was submitted that the plaintiff could not recover upon the check: first, because it was post-dated; secondly, because, before he obtained Griffiths's indorsement, the plaintiff had notice of the fraud practised by Griffiths upon the defendant.

The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him, if the court should be of opinion that the check, though post-dated and unstamped (otherwise than with the penny stamp imposed by the 21 & 22 Vict. c. 20, § 1), was a valid instrument, and that the plaintiff had a sufficient interest in the check to entitle him to sue upon it before he received notice of the alleged fraud.¹

H. James, in Hilary term last, obtained a rule *nisi* accordingly. He cited *Smith v. Pickering* and *Anonymous*.² [WILLES, J., referred to *Edge v. Bumford*.]

Karslake, Q. C., and *Macnamara*, now showed cause. Then, was there such a title in the plaintiff by the subsequent indorsement of the check as to entitle him to maintain the action? It appears that the defendant had been defrauded of the check by Griffiths. The plaintiff received it *bona fide* from Griffiths. At the time it was handed to

¹ The court decided that the instrument was properly stamped as a bill of exchange, and, whether post-dated or not, was a valid instrument. The arguments and opinions upon this point have been omitted. — ED.

² 1 Campb. 492, n.

him by Griffiths, it was not indorsed. The want of indorsement becoming apparent, the plaintiff, on the day the check was payable, but after he had received from the defendant an intimation of the fraud which had been practised upon him, went to Griffiths and obtained his indorsement; and then the plaintiff's title became apparently complete on the face of the document. Under these circumstances, it is submitted, the plaintiff cannot recover, and that the indorsement of the check by Griffiths after the plaintiff had had notice of the fraud was of no operation to give him a better title to the check than Griffiths himself had. According to the case of *Edge v. Bumford*, the plaintiff had no remedy in equity against the defendant before the indorsement. *Watkins v. Maule* will be relied on for the purpose of showing that a court of equity would have compelled Griffiths to indorse the check, the plaintiff having taken it for value. But that case is no authority to show that the defendant, who had at least equal equity with the plaintiff, could be made liable to one who had notice of the fraud before his legal title was complete. [WILLES, J. It seems to come to this, that an assignee of a chose in action is in the same position in equity as at law. He cannot have a better right than the assignor. See *Watts v. Porter*,¹ which has been followed by a series of cases.] Griffiths could have maintained no action upon the check; so neither can the now plaintiff.

H. James, in support of his rule. It is conceded that, before the indorsement actually took place, the plaintiff had notice substantially of the matters stated in the special plea; but it is submitted that the act of indorsement — which was a mere formality which was accidentally omitted when the transfer of the check took place — must have relation back. [ERLE, C. J. I have no very accurate perception of what is meant by a formality. A man's signing his name to a deed conveying the fee-simple of half a county is, in one sense, a formality.] No doubt, the indorsement was essential to enable the plaintiff to bring an action upon the instrument. But that is not the question. In *Chitty on Bills*, 10th ed., 167, it is said, that "if a party has delivered a bill without indorsing it, when it was intended that he should do so, a bill may be filed in equity to compel him, or his assignees, if he has become bankrupt, to indorse; and a special action on the case might be maintained against him for refusing to indorse: and, if a bill has been delivered before it is due, a formal indorsement may be made at any time after it is due, even by the administrator of the party by whom it was delivered;" and for these propositions the cases of *Rose v. Sims*² and *Watkins v. Maule* are cited. In *Smith v. Pickering*, it was

¹ 3 Ellis & B. 748.

² 1 B. & Ad. 521.

held that if a trader deliver over a bill for a valuable consideration to another, and forget to indorse it, he may indorse it after he has become a bankrupt. And, where a bill was delivered with the intent of transferring the property more than two months before a commission issued, but was not actually indorsed till within the two months, Lord Ellenborough held that the indorsement had relation to the delivery, and that the transaction was within the 46 Geo. III. c. 135, § 1. Anonymous.¹ [WILLES, J. There is no doubt about that. Nothing passes to the assignees but what the bankrupt is entitled to legally and equitably. But the question here is, whether Griffiths could, by indorsing this instrument, convey a larger right than he himself had.] In *Lempriere v. Pasley*,² an assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, were held to be good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. [ERLE, C. J. The assignment passed an equitable interest in the goods.] A mortgagee without notice purchasing the first encumbrance is allowed in equity to protect his estate against any person having a mortgage subsequent to the first, though he purchases the first encumbrance after notice of the subsequent mortgage. *Marsh v. Lee*.³ In the notes to *Basset v. Nosworthy*⁴ are collected a series of cases pointing out the equitable right of a purchaser to protect himself against a person claiming under a prior equitable title, by getting in the outstanding legal estate. The plaintiff's equitable interest being complete at the time the bill was delivered to him, the subsequent notice cannot be allowed to intercept the acquisition of the legal or formal right. [ERLE, C. J. I do not see what equitable interest the plaintiff had in the draft as against the defendant.]

ERLE, C. J. This is an action against the drawer of a bill of exchange; for, though in form a check, the instrument is for all the purposes of the stamp acts a bill. The plea is, that the bill was obtained from the defendant by one Griffiths by means of fraud, and that it was indorsed to the plaintiff after he had notice of the fraud. The facts are shortly these. The instrument was a negotiable instrument, which had been fraudulently obtained from the defendant by Griffiths, and had been handed over by Griffiths to the plaintiff in part satisfaction of a debt of a larger amount. But Griffiths, at the time he so handed over the bill to the plaintiff, omitted to indorse it. Under these circumstances, the condition of things was this, that the

¹ 1 Campb. 492, n.

² 2 T. R. 485.

³ 1 White & Tudor's Leading Cases in Equity, 494.

⁴ 2 Tudor's Leading Cases, 8, 15.

plaintiff had at that time the same rights as if an ordinary chattel had passed to him by an equitable assignment: he would have all the rights which Griffiths could convey to him. Now, Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing over the bill to another. According to the law-merchant, the title to a negotiable instrument passes by indorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value and without notice of any fraud. The plaintiff's title under the equitable assignment here, therefore, was to be rendered valid by indorsement; but, at the time he obtained the indorsement, he had notice that the bill had been fraudulently obtained by Griffiths from the defendant, and that Griffiths had no right to make the indorsement. Assuming, therefore, that there may be conflicting equities between the plaintiff and the defendant, I think the right should prevail according to the rule of law, and that the plaintiff had no title as transferee of the bill at all.

WILLES, J. I concur with my lord as to both points. As to the second point, the general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law-merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money; and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favor transfers in the ordinary and usual manner whereby a title is acquired according to the law-merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, now indeed recognized, and in many instances enforced, by courts of law; and it is therefore clear that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so. Until he does so, he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor. When he does so, he is affected by fraud, which he knew of before the indorsement.

KEATING, J. I am of the same opinion. The plaintiff sues as indorsee of the bill in question. The plea in substance is that the defendant was defrauded of it by the person to whose order it is made payable, and that the plaintiff had notice of that fact before the instrument was indorsed to him. The question is, when was the bill first indorsed to the plaintiff. It must be recollected that the plaintiff is

suing in a court of law, and that the right to sue in a court of law upon a negotiable instrument is not complete without a written indorsement. Now, before the plaintiff's right to sue was rendered complete by a written indorsement, he had notice of the fraud. The subsequent indorsement, therefore, transferred no title to sue. The rule must be discharged.

*Rule discharged.*¹

¹ *Esdaile v. Lanau*, 1 Y. & C. 394; *Savage v. King*, 17 Me. 301; *Clark v. Peabody*, 22 Me. 500; *Haskell v. Mitchell*, 53 Me. 468; *Allum v. Perry*, 68 Me. 232; *Lancaster Bank v. Taylor*, 100 Mass. 18; *Dowell v. Brown*, 21 Miss. 43; *Gibson v. Miller*, 29 Mich. 355 (*semble*); *Southard v. Porter*, 43 N. H. 379; *Clark v. Whitaker*, 50 N. H. 474; *Gilbert v. Sharp*, 2 Lans. 412; *Beard v. Dedolph*, 29 Wis. 136 (*semble*), *accord*.

Ranger v. Cary, 1 Met. 369; *Baggarly v. Gaither*, 2 Jones Eq. (N. Ca.) 80, *contra*.

Similarly, a ratification after the maturity of a bill of an unauthorized indorsement before maturity takes effect from the time of ratification. *Clark v. Peabody*, *supra*; *Gilbert v. Sharp*, *supra*. See *Weeks v. Medler*, 20 Kas. 57.

On the same principle, the delivery after maturity of a bill assigned without delivery before maturity transfers only the assignor's rights in the case of a bill transferable by delivery. *Evans v. Smith*, 4 Binn. 366. But see *Grimm v. Warner*, 45 Iowa, 106 (*semble*), *contra*. And *Conf. Howe v. Ould*, 28 Grat. 1. — ED.

JAMES R. BRYANT v. ARTHUR M. EASTMAN.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM
1851.

[Reported in 7 Cushing, 111.]

THIS was an action of assumpsit by the indorsee against the promisor on a note, of which the following is a copy : —

“\$250.

BOSTON, Feb. 9, 1848.

“Six months after date, I promise to pay to the order of New England Steam & Gas Pipe Co. two hundred and fifty dollars, value received.
LEMUEL LYON.”

On the back of the note was the name of the defendant, and underneath it the name of James Derby.¹

SHAW, C. J. Upon consideration, the court are of opinion that the action may be maintained.²

It was proved that at the time the note was made, there was no company actually existing, carrying on business, of the name indicated as payees; such a company had been incorporated by the legislature of another State, but no company had been organized. It further appeared that James Derby was carrying on the business of the manufacture and sale of steam and gas pipes, and that Lyon, with whom the defendant gave the note as co-promisor, had contracted a debt with Derby, thus dealing under the name in question, and that this note was given in satisfaction of that debt. These are facts extraneous to the note, not repugnant to it, and therefore may be proved by evidence *aliunde*.

It is a well settled rule, that a note or written simple contract may be declared on, according to its legal effect and operation. It has been decided that a note made to Richardson, Metcalf, & Co., might be declared on in the name of the Medway Cotton Manufactory, on proof that such name was used by that corporation.³ In a comparatively recent English case, where a note was made payable to a married woman during coverture, which, of course, was a note in legal

¹ The rest of the statement of facts, being substantially reproduced in the opinion of the court, has been omitted, together with the argument for the defendant. — ED.

² The court decided that the defendant was liable as a maker upon his irregular indorsement. The portion of the opinion relating to this point has been omitted. — ED.

³ Medway Cotton Manufactory v. Adams, 10 Mass. 360.

effect payable to the husband at his election, it was declared on as a note by which the defendant promised to pay to John Fearn, by the name of Mrs. Rachel Fearn, and by said John Fearn indorsed to the plaintiff; and it was held good. *Burrough v. Moss*. The same principles are adopted and affirmed in a recent case in this court.¹

There is certainly an inconvenience in an individual carrying on business by a name or description other than his own, but we are not prepared to say that it is illegal;² and the inconvenience to the party himself is, in general, sufficient to prevent it. But there are instances where, for the sake of notoriety, or preserving the good will of a trade, names are kept up, after the original parties have all disappeared, and the names of the parties really interested have all changed.

We do not consider it as a note payable to a fictitious payee, but as a note given to a real party, or his order, in satisfaction of a real debt contracted with that party, in a name not his own, but assumed and adopted as a business designation.³

As this is a promissory note, which might be specially declared on, as a note given by the defendant, payable to Derby, by the name of the New England Steam and Gas Pipe Company, or his order, and by Derby indorsed to the plaintiff, it may be given in evidence, in an action by the indorsee against the promisor, in support of the money counts.

Exceptions overruled.

¹ *Commercial Bank v. French*, 21 Pick. 486.

² See Stat. 1853, c. 156.

³ See *Walker v. McDonald*, 2 Ex. 527.

If a bill is made payable to a real person, although in a fictitious name, an indorsement by him in the same name is a valid transfer. *Forbes v. Epsy*, 21 Oh. St. 474; *Elliott v. Smitherman*, 2 Dev. & B. 338. So where a person represents himself to be the agent of an alleged, but non-existent principal, and receives a note payable to the principal, he may make a valid transfer, it is held, by indorsing it in the name of the principal. *Blodgett v. Jackson*, 40 N. H. 21; *Bull's Head Bank v. McFeeters*, 41 N. Y. Supr. Ct. 215.

In *Bolles v. Stearns*, 11 Cush. 320, it was held that the legal title to a note given to Joseph P. Reed for money lent by him, but by mistake made payable to John P. Reed was not transferred by the indorsement of "Joseph P. Reed." The propriety of this decision may well be doubted. The payee and indorser were the same person, for the note was really payable to Joseph P. Reed, although he was described therein as John P. Reed. For authority in support of this view, see *Willis v. Barrett*, 2 Stark. 29; *Moller v. Lambert*, 2 Camp. 548; *Taylor v. Strickland*, 37 Ala. 642; *Jestor v. Hopper*, 13 Ark. 43; *Sterry v. Robinson*, 1 Day, 11; *Chenot v. Lefevre*, 8 Ill. 627; *Curtis v. Baker*, 27 Ill. 514; *Wilson v. Turner*, 81 Ill. 403; *Leaphardt v. Sloan*, 5 Blackf. 278; *Patterson v. Graves*, 5 Blackf. 593; *Leonard v. Wilson*, 2 Cr. & M. 589; and conf. *Stevens v. Strang*, 2 Sandf. 138; *Cole v. Hills*, 44 N. H. 227; *Derby v. Thrall*, 44 Vt. 413. — Ed.

GRIMES v. PIERSOL.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1865.

[Reported in 25 Indiana Reports, 245.]

APPEAL from the Montgomery Circuit Court.

ELLIOTT, J. Piersol sued Noah W. Grimes on the assignment of a promissory note executed by George W. Grimes to said Noah W. Grimes, for the payment of \$100.

The assignment sued on, which is indorsed on the back of the note, reads thus:—

“Pay Isaac Piersol, or order.

“March 6, 1861.

N. W. GRIMES.”

Grimes answered, denying the assignment under oath, which was the only issue presented in the case.

By agreement of the parties, the issue was tried by the court without the intervention of a jury. The court found for the plaintiff, overruled a motion made by the defendant for a new trial, and rendered a judgment on the finding. The evidence is made a part of the record by a bill of exceptions. The only point presented by the appellant, under the motion for a new trial, is as to the sufficiency of the evidence to sustain the finding of the court.

On the trial, the defendant was called and sworn as a witness on the part of the plaintiff, and testified that the signature to the assignment was his genuine signature, and that he wrote the letter then shown to him, which was then given in evidence, and is as follows:—

“CRAWFORDSVILLE, Nov. 6, 1861.

“MR. ISAAC PIERSOL, Thorntown, Ind.

“DEAR SIR, — I am in receipt of a letter from H. H. Stillwell, Esq., of Covington, in regard to a note of George W. Grimes, which is indorsed by me, in which he says diligent efforts were made to collect said note, but failed, and says that I am now made liable, and wishes me to write to you what I can do. I will just say that I am not able to pay it at present, but I will see said George W. Grimes and try and get the matter arranged; and, if I fail, then I will make arrangements to settle this matter, without further cost, some time during the winter, which is as early as I can now promise, as I have a good deal of money to pay, and did not expect to have this to pay. Write me, and oblige

“Yours truly,

N. W. GRIMES.”

On cross-examination, Grimes further testified "that he assigned and transferred the said note to T. C. Barton, and filled up the assignment to said Barton; that the name of said Barton in the assignment has been erased by some one without his knowledge or consent, and the name of Isaac Piersol inserted over said erasure, without his knowledge or consent; that said letter was written to the said Piersol under the belief that said Piersol held said note by assignment, in the regular way, from said T. C. Barton, to whom he, witness, had assigned said note." This was all the evidence given in the cause. We assume that the facts are as stated by Grimes. The letter written by him to Piersol is in no respect inconsistent with his statements, while his explanation of the circumstances under which he wrote the letter is an equivocal denial that he had any knowledge, at that time, of the alteration of the assignment. Indeed, the facts as stated by him are not attempted to be controverted by Piersol's counsel.

The question then presented is simply this: Where a promissory note is assigned by an indorsement in full, to a particular person named therein, can the assignee or his vendee, without the consent of the assignor, strike the name of the assignee from the indorsement, and insert in its stead the name of such vendee, and thereby enable him to sustain a suit upon the assignment, against the assignor, as upon an assignment made to himself?

We think it clear that he cannot. The indorsement of a negotiable promissory note is of itself a contract, an original undertaking, and *prima facie* imports a good consideration; and, if without qualification, it either constitutes or implies a promise that the note is due and payable according to its tenor, and that the maker is solvent and liable to pay the same. 2 Pars. on Notes and Bills, 23; *Johnson v. Dickinson*,¹ *Tam v. Shaw*.

The indorsement of a negotiable note by the payee in blank carries with it the implied power that the person to whom it is delivered may fill up the indorsement with his own name, or the name of any other person he may desire, or, leaving the indorsement in blank, he may transfer it by delivery, and any subsequent holder may fill up the indorsement to himself, and sue upon it. But if the payee indorse such a note in full, as in the case at bar, the person to whom it is so indorsed cannot change or alter such indorsement by striking out his own name and substituting the name of another, but must himself indorse it, in order to transfer it to another; for, by indorsing it in full, the payee declares his intent not to be made liable except to such person, or by the indorsement so made to him. See, on this subject, 2

¹ 1 Blackf. 256.

² 10 Ind. 469.

Pars. on Notes and Bills, 20; Smith's Mer. Law, 289; Edw. on Bills, 268; Chitty on Bills, 257.

Mr. Parsons says: "A holder cannot alter the directions already given by indorsers, and must make out a chain to himself through them, until there is a blank indorsement." Notes and Bills, p. 19.

The reason for the rule is plain and obvious. The indorsement is the written contract of the indorser, and as such cannot be altered or changed without his consent.

It is also well settled that a material alteration of an instrument after delivery, by a party who claims the benefit of it, or by one under whom he claims, made without the consent of the party against whom it is sought to be enforced, renders it void. *Stoner v. Ellis*,¹ *The State v. Polk et al.*,² *Richmond, &c., Company v. Davis*.³

Here the alteration was clearly material. The assignment as sued on purports to have been made directly to Piersol, and deprives the defendant Grimes of any defence he might have thereto under the statute, as against Barton, to whom the assignment was, in fact, made. The change rendered it no longer the assignment of Grimes, and no recovery can be had against him upon it.

The judgment is reversed, with costs, and the cause remanded for a new trial.⁴

STRONG v. TOMPKINS AND ANOTHER.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1811.

[Reported in 8 Johnson, 98.]

THIS was an action of assumpsit, brought by the plaintiff, as indorsee of a promissory note for \$500, against the defendants, as makers, dated 29th May, 1807, payable to Henry Pitcher or order, on the 1st May, 1809. There was a blank indorsement to the payee, and by Isaac Spoor, which indorsement was made before the note became due. The cause was tried at the Columbia circuit, in September, 1810, before Mr. Justice Thompson.

The defendants gave in evidence a receipt, signed by the plaintiff, as follows: "Received from Henry Pitcher, a promissory note, drawn by Nathaniel Tompkins and Nehemiah Tompkins, payable to Henry

¹ 6 Ind. 152.

² 7 Blackf. 27.

³ Id. 412.

⁴ See *Porter v. Cushman*, 19 Ill. 572; *Burnap v. Cook*, 32 Ill. 168; *Horst v. Wagner*, 48 Iowa, 378; *Nevins v. Degrand*, 15 Mass. 436; *Bank of Utica v. Smith*, 18 Johns. 280; *Hunt v. Mitchell*, 4 Th. & C. 57. — Ed.

Pitcher or order, dated 9th May, 1807, and payable the 1st May, 1809, which is left in my hands, to be applied to the settlement of a demand, on which he is sued, in favor of Nicholas Kilmore, and also to the settlement of a demand of Henry Avery and Charles Suydam against Isaac Spoor, on which said Spoor also is sued. It is understood that the said Pitcher and Spoor are to attend to the entry of special bail, in the said causes, in due season, and to do whatever is necessary to be done to indemnify said Strong, as sheriff, in said suits, or to forfeit the amount of the said note. Jeremiah H. Strong."

The plaintiff's counsel objected to this evidence, but the objection was overruled by the judge, and the evidence admitted. It was admitted that the plaintiff was deputy sheriff, and acted as such, when he took the note and gave the receipt; and the judge was of opinion that the evidence was sufficient to prevent the plaintiff's recovery. The plaintiff then offered to prove that he had paid the moneys recovered by the plaintiff, in the suits mentioned in the receipt; but this evidence was overruled by the judge, who directed the plaintiff to be called, and a nonsuit to be entered, with liberty to the plaintiff to move the court to set it aside.

A motion was made to set aside the nonsuit, and for a new trial.

Van Buren and *Foot*, for the plaintiff, contended that this cause was within the settled rule of law; that the maker of a negotiable note, indorsed before it was payable, could not, in an action brought by the indorsee, set up a want of consideration, or avail himself of any matter of defence arising between him and the payee.

If this was a suit between the parties on an obligation, it might be within the 13th section of the act (24th sess. c. 28), which prohibits sheriffs from taking obligations, by color of their office, other than in the form prescribed by the act. But the transfer of the note to the plaintiff was a mere authority to sue, and the defendants cannot possibly be prejudiced by the present action. Their rights are not varied, or affected, by the conduct of the plaintiff and the other parties. They ought not, therefore, to be allowed to set up this defence to defeat the plaintiff's action, and to avoid their own responsibility. The defendants cannot be entitled to that relief which the statute gives to the party in the suit in which the security is taken.

E. Williams, contra.¹

Per curiam. The plaintiff, as deputy sheriff, took the note in question, instead of taking bail of Pitcher and Spoor. He took it by way of indemnity, and under the penalty of a forfeiture of the note, if he was not indemnified; and the note was to be applied towards the set-

¹ The argument for the defendant has been omitted. — Ed.

tlement of the demands for which P. and S. were sued. All this agreement was absolutely void by the statute,¹ which declares that "no sheriff or other officer shall take any obligation, for any cause aforesaid, or by color of their office, but only to themselves, and by the name of their office, and upon condition written, that the prisoner named therein shall appear at the day and place required in the process; and if any sheriff or other officer take any obligation in other form, by color of their office, it shall be void." Though the statute speaks only of an obligation, yet it has been long settled, under the statute of 23 Hen. VI., of which our act is a copy, that a promise to save harmless is equally within the statute.² The plaintiff in this case, as it appeared upon the trial, had no right of property in the note. He was not the legal holder, because the assignment to him was a nullity; and he had no more right to sue the defendants than if the name of the payee had been forged. To give effect to such contracts would lead to the greatest abuse and oppression, and would be suffering the provision of a very beneficial statute to be eluded.

Motion to set aside the nonsuit ought to be denied.

*Motion denied.*³

¹ Laws, vol. I. p. 210.

² 10 Co. 101 b.

³ To the same effect are *Bullock v. Dodds*, 2 B. & Ald. 258; *Gaither v. Farmers Bank*, 1 Pet. 37; *Nichols v. Fearson*, 7 Pet. 103, 106; *Freeman v. Brittin*, 2 Harr. 191 (*semble*); *Caswell v. Central R. R.* 50 Ga. 70 (*semble*); *Lloyd v. Keach*, 2 Conn. 175 (*semble*); *Bates v. Butler*, 46 Me. 387 (*semble*); *Gay v. Kingsley*, 11 All. 345; *Adams v. Rowan*, 16 Miss. 624; *Newman v. Williams*, 29 Miss. 212; *Lowes v. Mazaredo*, *infra*, 473; in which cases the transfer was absolutely void for illegality. See, however, *Nat. Pemberton Bank v. Porter*, 125 Mass. 333, where the court held that a national bank which had purchased a note might maintain an action thereon against prior parties, even though the bank might be prohibited by law from acquiring any legal title to or beneficial interest in the note. In *City Bank v. Perkins*, 29 N. Y. 554, it was even held that the transfer of a note by an unauthorized agent would enable a transferee to sue upon the note unless the principal asserted his claim. It seems unnecessary to add that neither of these cases can be supported upon any principle either of the common law or the law merchant. And the *dicta* in *Collier v. Nevill*, 3 Dev. 30, *Ray v. McMillan*, 2 Jones (N. Ca.) 277, *Cowles v. McVickar*, 3 Wis. 725, and the decisions in *Lee v. Ware*, 1 Hill (S. Ca.) 313, *Street v. Waugh*, 48 Vt. 298, seem equally open to criticism.

Where, however, the transfer, although unlawful, yet passes the title, *e. g.*, a transfer on Sunday, the transferee may sue prior parties to the paper, although he could maintain no action against his transferrer either on the paper or to recover his money paid. *Benson v. Drake*, 55 Me. 555, is *contra*; but it is believed that this case will not be generally followed. — Ed.

ASA A. PROUTY v. DWIGHT ROBERTS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1850.

[Reported in 6 Cushing, 19.]

THIS was an action of assumpsit on a promissory note signed by the defendant, payable to Daniel Whitney or order, on demand, and indorsed by Whitney. The note was dated on the 12th of August, 1849, and was put in suit on the 22d of October following.

The defendant pleaded the general issue, and offered evidence to prove that the note declared on was still the property of Daniel Whitney, the payee, and was never legally transferred by him, but was got out of his possession by false and fraudulent pretences, by Hart and Forbes, who represented that they had \$700 deposited in the savings-bank in Greenfield, which they would draw out and loan to him, if he would give them the note, by means of which pretences they got possession of the same; that these representations were false; that Hart and Forbes had not and never had any money deposited in the savings-bank; that the plaintiff, at the time he got possession of the note, knew that the same was thus fraudulently obtained from Whitney; and that he obtained it for a small consideration, much less than half the sum for which it was given.

The presiding judge, Mellen, J., ruled that the above facts, if proved, would not constitute a defence in behalf of the defendant. A verdict was thereupon rendered for the plaintiff, and the defendant excepted.

G. Grennell, for the defendant, cited *Whitwell v. Vincent*, 4 Pick. 449; *McKenzie v. McRae*, 8 Porter, 70; *Thurston v. Blanchard*, 22 Pick. 18; *Stevens v. Austin*, 1 Met. 557; *Ash v. Putnam*, 1 Hill, 302.

G. T. Davis, for the plaintiff.

BY THE COURT. The directions we think were right: the plaintiff proved a legal title to the note, and the facts proposed to be proved by the defendant could afford him no ground of defence. It was no fraud upon the defendant; he was called upon to pay only what he had undertaken to pay; and payment to the plaintiff would be a good discharge.¹

*Judgment on the verdict.*²

¹ *Knights v. Putnam*, 3 Pick. 184.

² *Carrier v. Sears*, 4 All. 336; *Tolman v. Gibson*, 1 Hall, 308; *Houghton v. McAuliffe*, 26 How. Pr. 270; *Brown v. Penfield*, 36 N. Y. 473, *accord.* — ED.

Mode of Transfer — (continued).

(c) CONFLICT OF LAWS.

DE LA CHAUMETTE v. THE BANK OF ENGLAND.

IN THE KING'S BENCH, MAY 6, 1831.

[Reported in 2 Barnewall & Adolphus, 385.]

TROVER for a bank-note. Plea, not guilty. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1829, the jury found a special verdict, setting out the following facts: One George Haselton, on the 28th of February, 1826, was lawfully possessed of the bank-note in the declaration mentioned; and, whilst he was so possessed thereof, some person or persons to the jurors unknown, on the day and year last aforesaid, feloniously stole, took, and carried away the same from the said George Haselton. The said Bank of England note afterwards was in the hands of M. Emerigue, a money-changer of respectability, and of great business at Paris, in the kingdom of France. Messrs. Odier & Co., bankers at Paris, being desirous of making a remittance of English money from Paris to the plaintiff, L. A. De la Chaumette (who then resided and carried on the trade of a merchant in London, and to whom Odier & Co. were then indebted in respect of transactions in business between them, in the sum of £1700) afterwards, on the 21st day of May, 1827, purchased from the said M. Emerigue for that purpose, among other English money, the said bank note, in the usual course of business, and for a valuable consideration, computed at the then rate of exchange between Paris and London. Odier & Co. afterwards, on the 22d day of May in the same year, in the regular course of business, remitted, on the general account, the sum of £1008 in English money and bank-notes, whereof the bank-note, so purchased as aforesaid, was one, from Paris to L. A. De la Chaumette, then being in London, who received into possession the last-mentioned Bank of England note, and retained the same in his possession from thence continually, until and at the time of the conversion and disposal of the same, hereafter mentioned. At the respective times of the aforesaid purchase and remittance, it was the practice for persons travelling from this country into France to take, for the purpose of paying their expenses, bank-notes; and for persons residing or domiciled in France to receive the same in pay-

ment. At the respective times of the aforesaid purchase and remittance, it was also the usual practice in Paris for bankers or other persons to make remittances from Paris to persons residing in England, in English money and bank-notes; and, for the purpose of making such remittances, to purchase of the money-changers in Paris, at the rate of exchange between Paris and London for the time being, English money and bank-notes. After the bank-note in the declaration mentioned had been so remitted as aforesaid, and the said L. A. De la Chaumette had thereupon become possessed of the same in manner aforesaid, the said governor and company, at the request and instance of the said George Haselton, converted and disposed of the same to their own use.

The case was now argued by

Platt, for the plaintiff. The general rule as to a bill or note assignable by delivery, and lost by theft or accident, is that the thief or finder may confer a title by transferring it (though if it be assignable by indorsement he cannot). *Miller v. Race*, *Grant v. Vaughan*, *Peacock v. Rhodes*. And the transferee has a good title to it, provided it came into his possession *bona fide*, and for a valuable consideration. Here it is found that *Odier & Co.* took the promissory note in the ordinary course of transfer. [PARKE, J. It is not found that the promissory note was transferred in France. That is not disputed.] (He was then stopped by the court.)

Follett, contra. The rule relied upon applies to negotiable instruments. If this was a negotiable instrument in France, and the plaintiff gave value for it, he might sue on it, notwithstanding the fact of its having been stolen. If it was not a negotiable instrument there, but a mere chattel or security, like a bond or note not negotiable, no property passed by the delivery; but it remains in Haselton, from whom it was stolen, because the property in such a chattel is not altered, except by sale in market overt. Now a promissory note is not negotiable by the custom of merchants, but was made so in this country by the statute of 3 & 4 Anne, c. 9. The question here is not whether that statute applies to render notes made in a foreign country transferable in England when indorsed in this country, as in *Milne v. Graham*, *Bently v. Northouse*; but whether a promissory note made in this country and indorsed or delivered abroad passes by such indorsement or delivery. Before the statute of Anne, a promissory note was only evidence of a debt, and not a negotiable security. *Buller v. Cripps*. It was not transferable by indorsement or delivery. The preamble of the statute of Anne shows that that was the state of the law. That statute makes promissory notes negotiable in England, in the same manner as inland bills of exchange. It therefore makes

them transferable by indorsement in England; but in France, or any other country, a promissory note would continue what it was before the statute, a mere chattel. In *Carr v. Shaw*,¹ the court intimated a strong opinion that the statute did not apply to foreign bills. In *Milne v. Graham* and in *Bentley v. Northouse*, a foreign note was held to be negotiable in England by indorsement, because the statute made all promissory notes transferable in England. But the act did not, and could not, make them transferable in a foreign country. It is not found what the law of France is; and, in the absence of proof to the contrary, which the plaintiff ought to have given, it may be assumed that the law of France does not authorize the transfer of a promissory note by indorsement or delivery.

LORD TENTERDEN, C. J. An inland bill of exchange was transferable here before the statute of Anne, by the custom of merchants, which was part of the common law introduced into this country, in consequence of the practice in other countries. If an inland bill of exchange, drawn and accepted in England, gets to Paris, it is undoubtedly negotiable there by the custom of merchants; and, if so, what is the effect of the statute of Anne as to promissory notes? It expressly recites that it was passed to the intent to encourage trade and commerce, which would be much advanced, if such notes should have the same effect as inland bills of exchange, and should be negotiated in like manner. The object clearly was to make promissory notes negotiable like English bills. If, therefore, English bills of exchange were negotiable when abroad, these notes ought to be so likewise, in order to satisfy the intention of the legislature; and I find nothing in the enacting part of the statute to restrain their negotiability to England. A note payable to bearer, therefore, is transferable abroad, just as an English bill of exchange drawn in England, and remitted to a foreign country, would be. It may be true that great injury has been suffered of late by the facility enjoyed of sending stolen notes abroad; but, on the other hand, the negotiability of English notes in foreign countries is a great convenience, as it saves the necessity of carrying abroad specie. The judgment of the court must be for the plaintiff.

LITTTLEDALE, J. The statute makes promissory notes transferable in the same manner as inland bills of exchange; and it seems to me, therefore, that it makes them transferable in a foreign country in the same manner as inland bills undoubtedly are by the custom of merchants. It follows that, since the statute, a note made in England, assignable by delivery, will pass as currency abroad as well as here.

¹ B. R. H. 39 G. 3. Bayley on Bills, 5th ed., p. 26.

PARKE, J. The question is, whether the plaintiff had the legal interest in this promissory note; and I have not the least doubt that he had by the express words of the statute of Anne. That statute enacts that all notes in writing, whereby any person promises to pay to any other person or persons, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be construed to be by virtue thereof due and payable to any such person to whom the same is made payable, and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be, according to the custom of merchants. Here, therefore, whoever was the bearer of the note may sue, unless it be shown that the note was not obtained *bona fide*, and for valuable consideration. It was so obtained here; and it comes, therefore, within the express words of the statute. A holder of an inland bill, indorsed to him in France, would undoubtedly be entitled to recover on it. If the effect of the statute were to make promissory notes transferable in England only, the circulation of such notes as this would be much impeded, for the property in a bank-note (remitted to a foreign country) would always remain in that person who was the last bearer in England; and it might be extremely difficult to say who he was. I think that this note was transferable in France by delivery; and it is very beneficial to the bank that that should be so, for it is their interest that their notes should have the most extensive circulation.

PATTESON, J. The question between the parties is reduced to this, whether a note made in England can be transferred in a foreign country. There is no limitation in this respect by the statute of Anne, for notes are made transferable in the same manner as inland bills of exchange. And as an inland bill of exchange (remitted to a foreign country) would be negotiable by the custom of merchants, it follows that promissory notes are so by the statute.

*Judgment for the plaintiff.*¹

¹ Robertson v. Burdekin (Court of Session), 6 D. 17; 1 Ross, L. C. 812, s. c.; President v. Minor, 17 Miss. 544 (*semble*); Foster v. Simmons, 40 Miss. 585 (*semble*); Grace v. Hannah, 6 Jones (N. Ca.), 94; Leake v. Gilchrist, 2 Dev. 73; Reddick v. Jones, 6 Ired. 107, *accord.* — ED.

TRIMBEY v. VIGNIER.

IN THE COMMON PLEAS, JUNE 9, 1834.

[Reported in 1 Bingham, *New Cases*, 151.]

THIS action was brought in February, 1833, by the plaintiff, an Englishman, resident in London, as holder, against the defendant as the maker of two promissory notes (one for 610 francs, the other for 300), in the following form :—

“ A la fin Decembre prochain je payerai à l'ordre de M. Burillon la somme de six cents dix francs valeur en marchandise.

“ Paris, le 10 Juillet, 1829.

“ B. P. 610 francs.

“ E VIGNIER,

“ Rue St. Denis, 193.”

Indorsed,

“ Payez à M. Durant valeur en compte.

Paris, le 30 Juillet, 1829.

“ P. BURILLON.

“ Je garantis à M. Durant le protêt et la dénonciation du présent billet, comme s'il avait été fait, le dispensant de ces formalités.

“ Paris, le deux Janvier, 1830.

“ P. BURILLON.

“ P. DURANT.”

At the trial, before Bosanquet, J., the plaintiff produced the notes, which were on unstamped paper, and proved the handwriting of the respective parties, and the value of the notes in English currency.

The defendant then called a witness, who stated himself to be an *avocat*, and that he had practised as such upwards of twenty years, and was then attached in that capacity to the French consulate in London; that he was conversant with the laws of France; that, by the law of France, a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were protested; that the indorsement to the plaintiff being in blank, and not according to the formalities required by the Code de Commerce, articles 136–138, was invalid, and passed no interest to the holder. In support of that statement, the articles in the Code de Commerce above referred to were read and translated to the jury. By 136, “ La propriété d'une lettre de change se transmet par la voie de l'endossement; ” 137, “ L'endossement est daté. Il exprime la valeur fournie. Il énonce le nom de celui à l'ordre de qui il est passé; ” 138, “ Si l'endossement n'est pas conforme aux dispositions de l'article précédent, il n'opère pas le transport, il n'est qu'une procuration.”

It was also proved that, at the time the action was brought, the defendant was domiciled and carried on business in London ; but, at the time when the notes respectively were drawn and fell due, the maker and indorser thereof were all resident in France, and French subjects.

The jury found, in reply to the inquiries of the learned Judge, that the defendant was living in France at the time when the notes were drawn, and when they fell due ; that Durant, the indorser, was also a resident in Paris at the same time ; that, according to the laws of France, the indorsement was invalid, and that a protest was necessary. On that finding, the learned Judge directed a verdict to be entered for the defendant, reserving all questions of law ; and such verdict was entered accordingly, with leave to move to enter a verdict for the plaintiff on the points reserved.

Subsequently to the verdict, by leave of the court, and with consent of the parties, it was given in evidence that the plaintiff was in England when he received the bills.

In the following term, *Taddy*, Serjt., moved to set aside the verdict on the following grounds :—

First, That, admitting the law of France to be as stated, it could not govern the right of parties resident in England ; the requisites of the code relied upon by the defendant being merely municipal regulations.

Secondly, That the law of France was misrepresented by the defendant's witnesses.

The court thereupon granted a rule calling on the defendant to show cause why the verdict should not be entered for the plaintiff, or why there should not be a new trial ; and directed that, before cause was shown, the opinion of French advocates should be obtained as to the law of France upon the points at issue.

Upon the rule coming on for argument, the court directed the circumstances to be set forth in a special case, and that it should contain any opinions of French advocates which had been taken on either side up to that period.

The opinion obtained by the plaintiff as to the indorsement in blank—the only point on which the court pronounced judgment—was as follows :—

“ This circumstance was no obstacle to Mr. Trimbey's right of action, for the 138th article of the Code de Commerce thus expressed : ‘ If the indorsement is not conformable to the requisition of the preceding article, it does not operate as a transfer of interest, but only as a procuration,’ is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. If, however, the holder under an indorsement in

blank does not proceed against the party immediately indorsing to him, but against the maker of the note, or against the parties who have made regular indorsements, neither the maker nor such parties can avail themselves of the provision of the 138th article of the code. Upon this point the jury has been completely led into error.

“Paris, the 21st of May, 1833.

BLANCHET.”

An opinion had been obtained by the defendant prior to the period when the rule *nisi* came on for argument, which, as to the indorsement in blank, was as follows:—

“There is no doubt that, according to the French law, an indorsement in blank is insufficient to transmit regularly the property in a bill of exchange or promissory note. The Code de Commerce is precise on this point. Art. 137 says: ‘The indorsement is dated; it expresses the value given for it, and states the name of him to whose order it is passed.’ The art. 138 adds: ‘If the indorsement is not conformable to the preceding article, it does not operate as a transfer,—it is only a procuration.’

“Paris, the 21st of October, 1833.

VERVOORT.”

The various authorities in the French law as to indorsement, which were relied upon in favor of the defendant, are to be found in the Code de Commerce, arts. 136–139, and art. 110.

The questions for the opinion of the court were:—

First, If the correct construction of the terms of the Code de Commerce which apply to the circumstances in this action were such as to prevent the plaintiff from enforcing payment against the defendant in the courts of France, would the law of France govern the rights of the parties under the circumstances of this case?

Secondly, If the decision of this case were to depend upon the terms of the Code de Commerce, then the court was to say how far the articles of the code relied upon by the defendant applied to the circumstances of this case, and whether a correct construction had been put upon such articles by the evidence and opinions produced by the respective parties.

If the court should be of opinion that, under the circumstances, the plaintiff ought to have recovered, then a verdict was to be entered for him; if not, the verdict for the defendant was to stand.

The case was argued in Easter term.

Taddy, Serjt., for the plaintiff. Admitting, for the sake of argument, that Trimbey could not have sued the defendant in the French courts, because Durant’s indorsement is not conformable to the 137th article of the Code de Commerce, he may nevertheless sue in the English courts, where an indorsement in blank operates as a complete

transfer. The interpretation of a contract is governed by the law of the country in which the contract is made; but the judicial procedure applicable to it depends on the law of the country in which the action is brought. Huberus de Conflictu Legum, tit. 3, § 7: "Receptum est optimâ ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius, lib. 1, tit. 12, def. 5, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi res judicata est." *De la Vega v. Vianna*,¹ *British Linen Company v. Drummond*,² *Williams v. Jones*,³ *Wynne v. Jackson*,⁴ *Shaw v. Harvey*,⁵ *Doe v. Vardill*.⁶ And the objection taken on the part of the defendant does not apply *ad valorem contractûs*, but *ad modum actionis instituendæ*.

Stephen, Serjt., for the defendant. The objection applies *ad valorem contractûs*, and not *ad modum actionis instituendæ*; for, if the indorsement be not in conformity with the French code, no interest passes to the holder, and consequently there is no contract between him and the maker. To ascertain whether there be any contract or not between the parties, we must resort to the law of the country where the contract was made. *Lacon v. Higgins*,⁷ *Dalrymple v. Dalrymple*.⁸ So, for the construction of the contract, *Talleyrand v. Boulanger*;⁹ and the right of action upon it, *Burrows v. Jemino*,¹⁰ *Ballantine v. Golding* (cited in *Smith v. Buchanan*),¹¹ *Solomons v. Ross* (cited in *Folliott v. Ogden*),¹² *Potter v. Brown*,¹³ *Clegg v. Levy*.¹⁴ For the maker cannot be supposed to have contemplated that he would be subject to rights of action according to the law of England; and, if the foreign law furnish the rule on one point, it must also furnish it on the others. *Tenon v. Mars*,¹⁵ *Innes v. Dunlop*.¹⁶ In *Shaw v. Harvey*, Lord Tenterden decided in effect that the contract was not a foreign contract. The *British Linen Company v. Drummond* is a decision on the Statute of Limitations, which affects only *tempus et modum actionis*; and *De la Vega v. Vianna* turned on the same distinction. The question, therefore, turns on the construction of the 137th and 138th articles of the Code de Commerce. Now, the 138th article is express and without qualification, that an indorsement in blank does not operate as a transfer of the note; and Pothier, in his commentary on the article (4th vol., edit. Dupin, 1827), says that the object of the law is to prevent fraud against the creditors of the

¹ 1 B. & Adol. 284.⁴ 2 Russ. 351.⁷ 1 D. & Ry. N. P. 38.¹⁰ 2 Str. 733.¹³ 5 East, 124.¹⁶ 8 T. R. 595.² 10 B. & C. 903.⁵ 1 M. & M. 527.⁸ 2 Haggard's Rep. 58.¹¹ 1 East, 10.¹⁴ 3 Campb. 166.³ 13 East, 439.⁶ 5 B. & C. 438.⁹ 3 Ves. 447.¹² 1 H. Bl. 131.¹⁵ 8 B. & C. 638.

indorser, and cites Heineccius to show that an indorsement in blank passes no property. It was a mere procuration, and a procurator cannot sue.

Taddy, in reply. Pailliet, Manuel de Droit Français, p. 1225, §§ 6, 8, in a note to article 138, gives a different view of the law of France as to a blank indorsement: "L'accepteur ne peut se refuser au paiement d'une lettre de change, sous le prétexte que l'ordre est en blanc. Les endosseurs et leur créanciers sont les seuls qui puissent faire valoir ce moyen." "L'endossement en blanc peut valoir autrement que comme procuration. Il peut valoir comme titre propre et personnel au porteur, s'il est constant que l'effet endossé en blanc fut remis au porteur avec l'intention de la saisir du titre; par exemple, pour lui servir de garantie des valeurs qu'il aurait fournies au souscripteur de l'effet."

If it can confer a title on the holder, why not a title to sue also? For if the indorser can transfer the property, the indorsee must have the right to obtain it. But indorsement is a mere formality, and not of the essence of the contract, and, therefore, the mode of proceeding upon it must be determined by the law of the country in which the action is brought. Huber, pp. 538, 540. *Dalrymple v. Dalrymple* was a case concerning marriage, which is a *status* and not a mere contract; and *Potter v. Brown*, and most of the other cases cited for the defendant, turned on the law of bankruptcy, in which the courts here have always given effect to the regulations of other countries.

Cur. adv. vult.

TINDAL, C. J. The point which has been reserved for consideration in this case is whether the plaintiff, under the circumstances stated in the special case, is entitled to maintain this action in an English court of law in his own name? For, as to the several other objections which have been raised, the view which we have taken of the question above adverted to renders it unnecessary for us to give any opinion.

The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country, each of the parties — the maker and the payee — being at the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France.

Upon this point of French law, the opinions of the foreign advocates, which have been taken, by consent, since the trial of the cause, appear to be contradictory; but as each of them founds his opinion on the Code de Commerce, arts. 137, 138, we feel ourselves at liberty to refer to the text of that code, in order to form our own judgment on the

point. And, upon reference thereto, we think the language of the code is clear and express, that an indorsement in blank — that is, without containing the date, the consideration paid, or the name of the party to whose order it is passed — does not operate as a transfer of the note: it is but a procuration. And the language of the code being general, and unrestricted by any expressions which confine its operation to questions between the indorsee and the indorser of the note, we think that, if an action had been brought in any of the courts of law in France against the maker of the note, it would have been held not to be maintainable in the name of the plaintiff, but that he should have sued in the name of the last indorser by procuration.

The question, therefore, becomes this: Supposing such rule to prevail in the French courts by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England applicable to the case of a note indorsed in blank in England allowing the action to be brought in the name of the holder?

The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*); the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). See Huberi Prælectiones Civilis Juris, tit. 3, De Conflictu Legum, § 7. This distinction has been clearly laid down and adopted in the late case of *De la Vega v. Vianna*.¹ See also the case of the *British Linen Company v. Drummond*,² where the different authorities are brought together.

The question, therefore, is whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit: for, in the former case, it must be adopted by our courts; in the latter, it may be altogether disregarded, and the suit commenced in the name of the present plaintiff.

And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed, the difference in the con-

¹ 1 B. & Adol. 284.

² 10 B. & C. 903.

sequences that would follow, if the plaintiff sues in his own name, or is compelled to use the name of the former indorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences, we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

We therefore think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here.

Judgment for the defendant.

LEBEL AND ANOTHER v. TUCKER.

IN THE QUEEN'S BENCH, NOVEMBER 27, 1867.

[*Reported in Law Reports, 3 Queen's Bench, 77.*]

DECLARATION that certain persons trading by the style of Cresswell, Cavernier, & Co., on the 29th of August, 1866, by their bill of exchange directed to the defendant, required the defendant to pay to their order £1,000, on the 15th of October then next; that the defendant accepted the bill, and the said persons indorsed it to the plaintiffs; but the defendant did not pay the same.

Pleas: 5. That the indorsement was made in France, and subject to the law of that country, and the indorsement has not transferred to the plaintiffs a right of suing on the bill in their own names, the indorsement not being conformable to the law of France, whereby indorsements of bills of exchange must be dated, and must express the consideration or value of such indorsement and the name of the indorsee, and whereby an indorsement not conformable thereto does not operate to transfer such right of suit. 7. Repeating the allegations in the fifth plea, and that the drawers indorsed the bill immediately to the plaintiffs, and the plaintiffs and the drawers, when the bill was made and indorsed, were resident and domiciled in France, within the empire of France, and were respectively subjects of such empire.

Replication to the fifth and seventh pleas, that the bill of exchange was drawn in England, accepted in England, and payable in England, and the indorsement to the plaintiffs was in accordance with English law.

Demurrer to the fifth and seventh pleas.

Demurrer to the replication.

Nov. 26. *Raymond*, for the plaintiffs. The facts appearing on the record are, that the bill was drawn, accepted, and payable in England, drawn by French subjects, and indorsed by them in France to French subjects, the indorsement being in blank, and therefore invalid according to the law of France. The bill being drawn, accepted, and payable in England, the contract was altogether an English contract; and the domicile or nationality of the parties cannot affect it. The action being against the acceptor, the question is, what is the contract of the acceptor? He promises to pay to an order valid according to the law of the place of contract. The *lex loci contractûs* must prevail, and the circumstance that the bill was negotiated in a country where a different law as to transfer prevails cannot affect the original contract. *Trimbey v. Vignier* in effect decides the question. That was the case of a French promissory note, indorsed in blank in France, and the court held that the law of France must override the whole contract. In *De la Chaumette v. Bank of England*, it was held that a promissory note payable to bearer in England was transferable by delivery in a foreign country; and Lord Tenterden observes in his judgment, "If an inland bill of exchange, drawn and accepted in England, gets to Paris, it is undoubtedly negotiable there by the custom of merchants." Story, *Conflict of Laws*, § 279, after observing upon the different views of foreign jurists as to which law is to govern, where the contracting parties are of different nationalities, proceeds: "In the common law of England and America, all these niceties are discarded. Every contract, whether made between foreigners, or between foreigners and citizens, is deemed to be governed by the law of the place where it is made, and is to be executed. Hertius¹ has put a case, where a contract made in one country is subject to a condition, and the performance of that condition takes place in another country, the laws of which are different; and the question is, whether the laws of the one or those of the other ought to govern the contract. He answers, the laws of the country where the contract was made, because the condition when fulfilled refers back to the time of the contract." In § 316 *a*, Story says: "Another illustration of the general doctrine may be derived from the case of negotiable paper, as to the binding obligation and effect of a blank indorsement." And he then cites with approbation the decision of *Trimbey v. Vignier*, as being "founded in the true principles of international jurisprudence; for it relates not to the form of the remedy,

¹ De Collis. Leg. s. 4, § 54; Opusc. vol. i., tom. i., p. 147, ed. 1737.

but to the interpretation and obligation of the contract." Again, in § 317, Story says: "Suppose a negotiable note is made in one country, and is payable there, and it is afterwards indorsed in another country, and by the law of the former country equitable defences are let in, in favor of the maker, and by the latter such defences excluded; what rule is to govern in regard to the holder in a suit against the maker to recover the amount upon the indorsement to him? The answer is, the law of the place where the note was made; for there the maker undertook to pay, and the subsequent negotiation of the note did not change his original obligation, duty, or rights. Acceptances of bills are governed by the same principles. They are deemed contracts of acceptance in the place where they are made, and where they are to be performed." The contract, if there is one, between the indorser and indorsee, can have no effect on the original contract of the acceptor: it has, in fact, nothing to do with the matter; for there may be a transfer of the right of suit without any contract or liability at all on the part of the transferor, as in the case of an indorsement *sans recours*, or by an infant, or as in the case of *Smith v. Johnson*.

Nov. 26 and 27. *Hayes*, Serjt. (*Harrington* with him), for the defendant. An indorsement is a new contract, and is governed by the *lex loci contractûs*, and therefore must, in order to be valid, have all the formalities required by the law of the place where it is made. The title, if acquired at all, is acquired in France, and therefore there can be no title, if none is acquired by the law of France. The decision of *Trimbey v. Vignier* was altogether independent of the note being French. It proceeded on the ground that the contract of transfer by indorsement was in France, and that therefore that contract must be governed by the law of France. The judgment itself shows this; and it is clear that Story so understands the judgment, for he says in the section (316 *a*) already cited from the *Conflict of Laws*, after stating what is required in France to make an indorsement a valid transfer: "Now, let us suppose a note made in Paris, payable to the order of the payee, and he should there indorse the same in blank, without the prescribed formalities, and afterwards the holder should sue the maker of the note in another country, for example in England, where no such formalities are prescribed; the question would arise, whether the holder could recover in such a suit in an English court upon such an indorsement. It has been held that he cannot." He then cites *Trimbey v. Vignier*, and proceeds: "And this decision seems to be founded in the true principles of international jurisprudence; for it relates not to the form of the remedy, but to the interpretation and obligation of the contract created by the indorsement, which

ought to be governed by the law of the place of indorsement." And in Story on Bills of Exchange, § 156, this section (316 *a*) is repeated. Again, it has been held that an English bill may be discharged by a payment good in the country where made. *Ralli v. Dennistoun*.¹

[LUSH, J., referred to *Rothschild v. Currie*.]

That case, though to a certain extent acted upon in *Hirschfeld v. Smith*, has been questioned, particularly by Story on Bills, § 296. Pothier, *Contrat de Change*, no. 38, gives as a reason for the particularity required in an indorsement by the French code, that it is a fresh contract just as the original bill; and it is clear that it is a new contract, for if the indorsement be general the bill becomes payable to bearer.

[MELLOR, J. In Byles on Bills, p. 139, 8th ed., it is said, "Every indorser of a bill is in the nature of a new drawer."]

That was the ground of the decision in *Allen v. Walker*.²

[LUSH, J. But the indorser is not the drawer of a new bill.]

The indorsement is a contract by which a fresh person becomes a party, and acquires a right to sue on the instrument: though not a new bill, there is a new contract, which therefore must be governed by the *lex loci*.

[LUSH, J. See to what results that would lead. If the holder of an English bill, indorsed generally, hand it over to another for value in France, the latter could not, if that argument is right, sue upon it even if he brought it back to England; but, if the same thing had been done in England, he could.]

In Story on Bills of Exchange, § 131, the law is thus laid down: "In respect to foreign bills of exchange, they are generally, as to their validity, nature, interpretation, and effects, governed by the laws of the State or country where the contract between the particular parties has its origin. The contract of the drawer is, as to the form, the nature, the obligation, and the effect thereof, governed by the law of the place where the bill is drawn, in regard to the payee, and any subsequent holder. The contract of the indorser is governed by the law of the place where the indorsement is made, as to his indorsec, and every subsequent holder. The contract of the acceptor is governed by the law of the place of his acceptance, as to the drawer, the payee, and every subsequent holder, unless he accepts in one place payable in another place; for in the latter case the law of the place where the bill is payable will govern in regard to the same parties. So that very different contracts, of very different natures, and of various obligations, may arise between different parties, under one and the same bill of exchange, according to the place where the

particular transaction takes place." In France, most certainly, the law is, that an indorsement to be valid must be in accordance with the law of the place where it is made. Thus, in *Hirschfeld v. Smith*, a passage is cited from Bravard-Veyrières' and Demangeat's treatise on Commercial Law, vol. 3, tit. Lettre de Change, p. 33, which puts the exact converse of the present case, and the authors say: If a bill of exchange is indorsed in London, although the bill were drawn in France and be payable in France, recourse must be had to the English law to ascertain the validity of the indorsement and to determine its effects. In *Allen v. Kemble*, in the judgment of the Judicial Committee, delivered by Lord Kingsdown, it is put as a proposition not denied, "that when a bill is drawn generally, the liabilities of the drawer, acceptor, and indorser, respectively, must be governed by the laws of the countries in which the drawing, acceptance, and indorsement, respectively, took place."

[LUSH, J. "Respectively;" that is, that the liability of the acceptor on his contract is governed by the law of the country in which the acceptance takes place.]

Here the drawer and payee was a Frenchman, living in France; and the bill is payable to his order, not to bearer. The probability was, therefore, that the bill would be indorsed in France; and the contract is to pay to an order valid according to the law of the country where the bill may be negotiated.

[LUSH, J. The interpretation of the contract cannot vary according to the nationality of the parties: it must depend on the law of the place of contract.]

Raymond, in reply. The action is against the acceptor; and the single question is, what was the contract of the acceptor? He can only be taken to have contracted with a view to the law of the country which is the place of contract. The passage cited from Story on Bills, § 131, is directly in the plaintiff's favor; for he says: "The contract of the acceptor is governed by the law of the place of his acceptance, as to the drawer, the payee, and every subsequent holder." And it is quite immaterial for the present question what the rights of the indorsee against the indorser may be.

MELLOR, J. Although the point raised is novel and somewhat important; yet the authorities have been so fully brought before us, and having had the opportunity for consideration since yesterday, as we have really no doubt on the subject, we think we may proceed to give judgment at once. The action is brought by indorsee against acceptor; and it appears from the replication that the bill was drawn, accepted, and payable in England, and the indorsement was valid according to the law of England. The question is, whether the con-

tract of the acceptor, which is to pay to the order of the drawer, amounts to a contract to pay to any order if valid by the law of England; and we think that it does. I abstain altogether from expressing any opinion, as it is quite unnecessary to do so, as to what might be the effect of an indorsement of the bill in blank in France, as between the indorser and any subsequent indorsee in an action against the indorser himself: all we have to determine is, whether the indorsement made according to the law of England, though made in France, was made according to the contract of the parties, so as to pass to the holder the right to sue the acceptor. It has been said that every indorser is in the nature of a new drawer, and no doubt he is so for some purposes, as against himself; and to that extent there is a new contract created by the indorsement; but the original contract remains. *Trimbey v. Vignier* is an authority in favor of this view. That was the case of a foreign promissory note; and the question really turned on whether an indorsement according to the English law enabled the holder to sue the maker in England; and the court held that it did not, as it was a matter which went to the interpretation of the contract, and not merely to the mode of instituting the suit. We have here to interpret the contract, which was made in England, to be performed in England; and we are satisfied that the indorsement need only be such as the contract contemplates. We think that the acceptor in a case like the present undertakes to pay to the payee or his order by an indorsement valid according to the English law.

LUSH, J. I am of the same opinion. The action is on a bill drawn, accepted, and payable in England, and which is therefore an inland bill; and the action is brought by persons claiming the right to sue by title derived from the drawers and payees according to the English law. The defence is that the indorsement was made in France, and is not conformable to the law of France, which requires that the indorsement should bear a date, and express the consideration for the indorsement and the name of the indorsee. The question is, is that any answer to an action against the acceptor of an English bill? The circumstances are somewhat novel, but the principle applicable is not novel: it existed before, and is well established by the decision in *Trimbey v. Vignier*; viz., that contracts must be governed by the law of the country where they are made. Now, the contract on which the present defendant, the acceptor, is sued, was made in England. The contract which the drawer proposes is this: he says, "Pay a certain sum at a certain date to my order;" the acceptor makes this contract his own by putting his name as acceptor, and his contract, if expanded in words, is, "I undertake at the maturity of the bill to pay

to the person who shall be the holder under an indorsement from you, the payee, made according to the law-merchant." How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character: it remains an inland bill up to the time of its maturity, and is negotiable according to English law; and by the English law a simple indorsement in blank transfers the right to sue to the holder. This principle is pointedly applied by the judgment in *Trimbey v. Vignier*. My Brother Hayes is mistaken in supposing that the judgment deals *simpliciter* with the place of the indorsement, without reference to the fact of the instrument itself being a French note; on the contrary, that fact lies at the very bottom of the decision. Thus, at the very commencement of the judgment, Tindal, C. J., after saying that the point reserved was whether the plaintiff, under the circumstances stated in the case, was entitled to maintain the action in an English court of law in his own name, proceeds: "The promissory note was made by the defendant in France; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first inquiry, therefore, is, whether this action could have been maintained by the plaintiff against the defendant in the courts of law in France." He then discusses what is the law of France, and comes to the conclusion that the plaintiff, the indorsee, could not have sued the maker in his own name in the courts of France; and proceeds: "The question, therefore, becomes this: Supposing such rule to prevail in the French courts by the law of that country, is the same rule to be adopted by the English courts of law, when the action is brought here, the law of England applicable to the case of a note indorsed in blank in England allowing the action to be brought in the name of the holder? The rule which applies to the case of contracts, made in one country and put in suit in the courts of law of another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractûs*); the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." He then cites authorities for this position, and concludes: "The question, therefore, is, whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit. . . . And we think the French law on the point above mentioned is the law by which the contract is governed, and not the

law which regulates the mode of suing. . . . If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. . . . We think that our courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here." The judgment, therefore, proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, it must be governed by the law of France. So, here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes. Therefore, as it seems clear to me, the plaintiffs are entitled to judgment. It is not necessary to consider what would be the effect of this indorsement as against the indorser, if sued in France: probably, the courts of France would hold that the English law governed. All we decide is that, the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England, and that the plaintiffs have acquired a right to sue.

*Judgment for the plaintiffs.*¹

BRADLAUGH v. DE RIN.

IN THE COMMON PLEAS, JULY 6, 1868.

[*Reported in Law Reports, 3 Common Pleas, 588.*]

IN THE EXCHEQUER CHAMBER, MAY 17, 1870.

[*Reported in Law Reports, 5 Common Pleas, 478.*]

DECLARATION on three bills of exchange by indorsee against acceptor.

Pleas, traversing the acceptance and the indorsements.

The cause was tried before Montague Smith, J., at the sittings in London after last Michaelmas term. It appeared that the bills were drawn in France upon the defendant in England, and were there accepted by the defendant. The last indorsement upon each of the

¹ *Everett v. Vendryes*, 19 N. Y. 436, *accord.* — ED.

bills was made in France, and was in blank. It was proved that such an indorsement was not valid by the law of France, and that it did not transfer any property in, or right to sue upon, the bills according to the law of France; but only amounted to a procuration, and that the plaintiff would not be the proper person to sue upon the bills in France. It was thereupon contended on the part of the defendant that, the bill being a French bill, the right of an indorsee to sue upon it could only be created by an indorsement valid by the law of France.

A verdict was taken for the plaintiff, subject to leave reserved for the defendant to move to enter the verdict for him.

Keane, Q. C., in Hilary term last, obtained a rule *nisi*.

Lumley, in Trinity term, showed cause. The bills, though drawn abroad, were English bills. They were directed to the drawee in England, and were by him accepted generally in England; consequently, an indorsement good according to the English law was sufficient to enable the indorsee to sue upon them here. The interpretation of a contract is governed by the place where the contract is made: the mode of suing must be governed by the law of the country where it is sought to be enforced. In *Trimbey v. Vignier*, where a promissory note was made by the defendant in France, and there indorsed in blank by the payee, the maker and payee both at the times of making and indorsing the note being domiciled there, it was held that, as no action could have been maintained upon the note in the French courts of law in the name of the indorsee, the indorsement according to the law of France operating as a procuration only, and not as a transfer, so no action could be maintained by him in our courts. But, in *Lebel v. Tucker*, where the bill was drawn, accepted, and payable in England, it was held that a blank indorsement made in France by a person domiciled there enabled the indorsee to sue the acceptor in this country. That case would have been exactly in point but for the fact that these bills were drawn in France. But, for the purpose of charging the acceptor, that fact makes no difference. In *Story on Bills*, § 131, it is said: "In respect to foreign bills of exchange, they are generally, as to their validity, nature, interpretation, and effect, governed by the laws of the state or country where the contract between the particular parties has its origin. The contract of the acceptor is governed by the law of the place of his acceptance, as to the drawer, the payee, and every subsequent holder, unless he accepts in one place payable in another place; for, in the latter case, the law of the place where the bill is payable will govern in regard to the same parties." In § 133, dealing with *Trimbey v. Vignier*, the learned author says: "The court on that occasion said that the question as to the transfer was a question of the true interpretation of the contract, and was

therefore to be governed by the law of France, where the contract and indorsement were made." Here, however, the contract of the acceptor is governed by the law of the place of acceptance and payment. Lush, J., in *Lebel v. Tucker*, says: "The judgment in *Trimbey v. Vignier* proceeds on the ground that the contract, that is, the contract of the maker of the note, having been made in France, must be governed by the law of France. So, here, the contract of the acceptor, having been made in England, must be governed by the English law. It would be anomalous to say that a contract made in this country could be affected by the circulation and negotiation in a foreign country of the instrument by which the contract is constituted. The original contract cannot be varied by the law of any foreign country through which the instrument passes." And see *Byles on Bills*, 8th ed., 370.

[WILLES, J., referred to *Hirschfeld v. Smith*, where Erle, C. J., says: "As regards the protest and notice of dishonor, the place where the bill is payable governs."]

In *Lebel v. Tucker*, Lush, J., says: "The contract of the acceptor, if expanded in words, is, 'I undertake at the maturity of the bill to pay the person who shall be the holder under an indorsement from you, the payee, made according to the law-merchant.' How can that contract of the acceptor be varied by the circumstance that the indorsement is made in a country where the law is different from the law of England? The bill retains its original character: it remains an inland bill up to the time of its maturity, and is negotiable according to the English law."

[WILLES, J., referred to *Nougier des Lettres de Change*, vol. i. p. 364, § 412.¹]

¹ The passage referred to is as follows: "Le Code de Commerce contient une lacune qu'il est important de signaler. Aucune de ses dispositions ne détermine le cas que l'on doit faire, en France, d'effets négociables passés à l'étranger, et couverts d'endossements conçus dans des formes particulières. Sur ce point, cependant, des règles précises étaient indispensables; car d'embarrassantes questions peuvent s'élever. Dans le silence de la loi, il faut recourir aux principes généraux du droit et aux usages commerciaux. Une maxime domine toute la matière; c'est celle qui dit que *Locus regit actum*. Quand il s'agit de mariages, de testaments, ou d'autres contrats fait en pays étrangers, la loi particulière du lieu règle la forme particulière de l'acte, qui est valable en France pourvu qu'on y retrouve les conditions substantielles et d'ordre public. Pareillement dans les lettres de change, qui sont des actes du droit des gens, il est juste de faire l'application de cette maxime, de tenir compte des législations étrangères, et de les admettre avec leur formes spéciales, lorsque l'on y rencontre les caractères qui sont de rigueur chez nous. Dans les endossements, les formalités prescrites sont arbitraires, en ce sens qu'on peut les modifier sans altérer le contrat de change et sans le détruire. Par exemple, la date est voulue en France; dans certains lieux, son omission est autorisée; un endossement venant sans date de l'un de ces lieux, aurait cours et valeur, parceque l'omission n'empêche pas le contrat de change, et que l'endossement n'est qu'un mode de cession indépendant de la perfection de la lettre."

Keane, Q. C., and *C. W. Wood*, in support of the rule. If the bills in question had been accepted as well as drawn in France, the bill would have been a foreign bill, and the law of France would govern the case. *Trimbey v. Vignier*. *Lebel v. Tucker*, proceeds upon the ground that the bill was entirely an inland bill, and therefore an indorsement valid according to the law of England was sufficient to pass the property as well as the right to sue here. These bills, however, though accepted in England, must clearly be treated as foreign: *Byles on Bills*, 8th ed., 379. The contract of the acceptor is to pay the bill to the drawer or to one holding under a legal indorsement. If these bills are to be treated as foreign bills, the judgment of this court in *Trimbey v. Vignier* applies.

[MONTAGUE SMITH, J. In *Rothschild v. Currie*, the bill was drawn in England, in favor of the defendant, on a house in Paris, and payable there. The defendant indorsed it to the plaintiff, both being domiciled in England. And the court say that, as it is a French bill, they ought to be guided by the law of France. Here, the bills were drawn in France, but accepted and payable here. They are therefore English bills.]

In that case, the question turned upon whether or not there had been due notice of dishonor. Here, the plaintiff's title to sue, if acquired at all, is acquired in France, and therefore he can have no title, if none is acquired by the law of France. In *Story's Conflict of Laws*, § 316 *a*, the author, after stating what is required in France to make an indorsement a valid transfer, says: "Now, let us suppose a note made in Paris, payable to the order of the payee, and he should there indorse the same in blank, without the prescribed formalities, and afterwards the holder should sue the maker of the note in another country, for example, in England, where no such formalities are prescribed: the question would arise whether the holder could recover in such a suit in an English court upon such an indorsement. It has been held that he cannot." He then cites *Trimbey v. Vignier*, and proceeds: "And this decision seems to be founded in the true principles of international jurisprudence; for it relates not to the form of the remedy, but to the interpretation and obligation of the contract created by the indorsement, which ought to be governed by the law of the place of indorsement." The judgment of *Lush, J.*, in *Lebel v. Tucker*, properly understood, is in the defendant's favor.

Cur. adv. vult.

July 6. The judgment of *Bovill, C. J.*, and *Willes, J.*, was delivered by

WILLES, J. This was an action by the alleged indorsee of a bill of exchange drawn in France upon and accepted by the defendant in

England, and in France indorsed in blank to the plaintiff, who sued thereon in his own name, and had a verdict, subject to leave, reserved to enter a nonsuit, upon the ground that, by the law of France, an indorsement in blank does not transfer any property in or right to sue upon the bill, but amounts to a procuration only, according to the 138th article of the Code de Commerce. A rule was accordingly granted; and the question was argued last term, before the Lord Chief Justice, Mr. Justice Montague Smith, and myself, when we took time to consider.

Where a bill is accepted as well as drawn in France, there, according to *Trimbey v. Vignier*, the law of France must prevail, and the indorsement in blank is insufficient to give a right of action here. Where the bill is drawn as well as accepted in England, there, according to *Lebel v. Tucker*, the indorsement in blank is valid for all purposes here.

The present is an intermediate case, the acceptance being English, but the bill being a French bill in its inception, and according to our law considered foreign for the purpose of protest, so that, without formal protest by a notary, no action could be maintained against the drawer (see *Byles on Bills*, 9th ed., 209), as it can upon an inland bill upon simple presentment and notice of dishonor. And, as against the drawer, there can be no doubt that the general rule, that the formalities of acts are governed by the law of the place (*locus regit actum*), would apply, and that a blank indorsement was therefore insufficient to transfer the bill or to give a right of action.

The argument for the plaintiff was, in effect, that the contract of the acceptor was to pay to any person holding the bill by indorsement in the form sufficient by the English law, and that he was entitled and liable to pay accordingly.

On the part of the defendant, it was answered that the acceptor is no doubt entitled to pay upon a blank indorsement, because it amounts to a procuration, at all events until countermand and notice; but that he can only be liable to an action either at the suit of the drawer or a person claiming under the drawer by an indorsement, which as against the drawer transfers the right to the bill; that his contract is to pay the drawer or the person to whom the drawer has made a valid transfer of his rights; that no intention to make such transfer can in this case be imputed to the drawer; and that, without such intention, the mere writing of his name is inoperative. *Marston v. Allen*.

Upon consideration, the Lord Chief Justice and myself think the arguments for the defendant must prevail. No authority was cited, nor can we find any, to show that there may be a partial indorsement of a bill of exchange. It certainly cannot be indorsed so as to allow of an action by the indorsee for part of the amount, and by the in-

dorser as to the residue. The indorsement must be good for the whole or none. And the same rule against splitting the liability upon the bill by a partial indorsement (see Byles on Bills, 9th ed., 167) seems equally to forbid an indorsement which shall be effectual to transfer the right of action against the acceptor, but not the drawer's right to the bill or any action against him. The indorsement of a bill without recourse, though it give no right of action against the indorser, does transfer all his right of action upon the bill, and is therefore no exception to this rule. It would be anomalous that, in case of a French draft, the alleged indorsee should be able to sue in England as upon a transfer from the French drawer in France, when the drawer is not bound by such indorsement, and might sue in his own name, treating the possession of the alleged indorsee as that of his agent.

The Lord Chief Justice and myself are, for these reasons, of opinion that the case is governed by *Trimbey v. Vignier*, and that the rule for a nonsuit ought to be made absolute.

MONTAGUE SMITH, J. This action is brought by the holder against the acceptor of a bill of exchange drawn in France and accepted in England; and the question arises whether one of the indorsements of the bill made in France, not in accordance with the law of France, but sufficient according to the law of England, is a good indorsement as against the acceptor. I think it is.

The contract of the acceptor is made here, and is to be performed here; and, according to well-known principles, the contract of the acceptor would be governed by the law of England, unless there is something in the nature of the contract on a bill of exchange which creates a difference. Now, the contract of the acceptor is made with the drawer to pay the bill at maturity to him or his payee or indorsee (as the case may be), or to the ultimate indorsee or holder. The original contract to pay no doubt passes, by the law-merchant, by assignment. Superadded contracts may and do arise between the indorsers and those taking from them, *inter se*; but the original contract remains as against the acceptor. That contract in this case is an English contract; and it seems to me the drawer and the indorser transfer it as an English contract, and can confer by transfer no right to any indorsee to treat it otherwise than as an English contract, as against the acceptor. If so, it then comes to the question what the English contract of the acceptor really is. Is it a contract to pay upon indorsements good by the law of France, or good by the law of the country where the indorsements happen to be made, or upon indorsements good and sufficient by English law? It seems to me the last is the contract, and that the acceptor agrees to pay to whomsoever is constituted the holder according to English law. I cannot think that the

fact that the bill was drawn in France, and not in England, makes an essential difference on this point. It was an accident that the indorsement in question was made in France. Suppose this bill had been indorsed at Vienna, what law was then to prevail? It might be the law of Austria; but it would not, I apprehend, be the law of France. The real question seems to resolve itself into this, whether the manner of indorsement of a bill accepted in England and payable here is to be governed by the law of the foreign country where it happens to be made, or by English law. This point appears to have been decided by the Court of Queen's Bench, in the late case of *Lebel v. Tucker*, where it was held that an indorsement made in France of a bill drawn and accepted in England, and which was invalid by French law, but sufficient according to English law, entitled the indorsee to maintain an action against the English acceptor. It is true that, in that case, the bill was drawn in England; but there does not seem sufficient reason for holding that that fact constitutes the essential distinction with regard to the sufficiency of an intermediate indorsement, as against the acceptor. It would seem that either the law of the country where the bill is accepted and payable, or where it is indorsed, must prevail; and the Court of Queen's Bench has held that the former law governs.

Agreeing as I do with that decision, and thinking that in substance it governs this case, I do not consider it necessary to go through the authorities which were cited before that court.

I should have given this judgment with more hesitation, opposed as it is to that of my Lord and my Brother Willes, but for the support which I think it receives from the decision of the Court of Queen's Bench. I own also I give it with less reluctance than I should otherwise feel, because it seems to me that it would place the acceptors of bills in a position of great difficulty and peril, if the law of the country of the indorsement, whatever it may be, and not the law of the place of acceptance and payment, is to govern.

For these reasons, I think the plaintiff is entitled to keep his verdict, and that the rule ought to be discharged.

Rule absolute to enter a nonsuit.

APPEAL against a decision of the Court of Common Pleas, making absolute a rule to enter a nonsuit.

Action upon three bills of exchange for £120, £80, and £80, respectively, drawn on the 28th and 29th of April, 1866, by Van den Bronck upon and accepted by the defendant, payable respectively one month after date to the order of the drawer, and indorsed by him to Emile Berle, by Berle to Edward Herzberg, by Herzberg to Gellet, and by Gellett to the plaintiff.

The only material pleas were traverses of the several indorsements.

The cause was tried before Montague Smith, J., at the sittings in London, after Michaelmas term, 1867. The bills were drawn by Van den Bronck in Brussels, and sent for acceptance to the defendant, who resided in London, and were accepted there by the defendant, who returned them to Van den Bronck.

The indorsements by Van den Bronck were made at Brussels; those of Berle, Herzberg, and Gellet, in Paris. It was found that full value had been given for the bills by Berle. [The bills were indorsed to the plaintiff that he might receive the proceeds on Gellet's account.]

It was objected, on the part of the defendant, that indorsements in France were invalid, unless they complied with certain formalities required by the Code de Commerce; and he called as a witness a French jurisconsult who had practised law in Paris, and who, on inspecting the bills, stated that the indorsements upon the bills were in the correct form according to the law of France, with the exception of the last indorsement on each bill, which was in blank, and invalid according to the law of France; that, being invalid, such last-mentioned indorsement only operated as a procuration, and left the title in the bills to the party so indorsing. Articles 137, 138 of the Code de Commerce, were also cited by the defendant's counsel; and it was agreed that the whole of the code should be considered as in evidence.

The learned judge directed a verdict to be entered for the plaintiff for £301 12s., the defendant having leave to move to enter a verdict for him on the ground that the indorsements should have been made according to the French law, and that on each of the bills the last indorsement was not so made.

A rule *nisi* was accordingly obtained in Hilary term, 1868, which was made absolute at the sittings *in banc* after Trinity term, 1868.

Lumley Smith, for the plaintiff. The plaintiff is entitled to recover, even if the indorsement gives no right to sue by the French law. *Lebel v. Tucker*. And assuming the bills in question to be foreign bills, and that they require an indorsement valid by French law, there is nothing in the Code de Commerce to disentitle the plaintiff to maintain an action against the acceptor.

C. W. Wood, for the defendant. By articles 137 and 138 of the code, the plaintiff would be unable to sue on the bills in France. In *Trimbey v. Vignier*, it was held that a plaintiff claiming under an indorsement in blank made in France, as in this case, could not sue on the bill in England.

[COCKBURN, C. J. The meaning of articles 137 and 138 is explained in Paillet, *Manual de Droit Français*, vol. ii. p. 1140, ed. notes 3-6. The indorsement in blank, it seems, does not pass the property in the

bill, but is only a procuration; that is, the indorsee takes it subject to all the equities, as in the case of an overdue bill with us.]

[BLACKBURN, J. In *Trimbey v. Vignier*, the Court of Common Pleas seem to have misunderstood the opinions of the advocates.

COCKBURN, C. J., referred to Bédarride, *Lettre de Change*, vol. i., p. 430, §§ 321, 322.]

Lumley Smith was not called upon to reply.

COCKBURN, C. J. What is the law of a foreign country is a question of fact, and not of law. This has long been recognized and acted upon. In the present case, however, by agreement of the parties, the Code de Commerce is considered as in evidence; and, in order to put a proper construction upon its provisions, we may properly, I think, have recourse to such assistance as the French jurists may afford us. With the greatest respect for the high authority of the very learned judges who presided on the occasion, I must say that the decision of the court in *Trimbey v. Vignier* surprises me. The opinions given by the two French advocates in that case seem to me to be perfectly reconcilable with each other. One of them — that of M. Blanchet — is positive that the 138th article of the Code de Commerce is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. And that is not negatived by the opinion of M. Vervourt. I therefore do not feel myself bound by that case. The question then is, what is meant by a “procuration” in article 138? I find it laid down by two French jurists of great distinction, viz. Paillet and Bédarride, in the passages referred to in the course of the argument, that an irregular indorsement — that is, one which does not comply with the formalities prescribed by article 137 of the Code de Commerce — does not pass the property in the bill or note absolutely, but only to this extent, that it is open to all the exceptions which would be available against the indorser himself. Subject to that, the person who takes by virtue of an indorsement in blank is entitled by the law of France to sue upon the bill or note in his own name. That seems to me to be the good sense of the thing. It prevents the possibility of any fraud or malpractice. We do not find in the ordinary transactions of the commercial world any inconvenience resulting from indorsements in blank, which are the ordinary indorsements in use amongst us. It is conceded that, if the action had been brought by or in the name of Gellet, there would have been no defence. And I am clearly of opinion that the objection cannot be taken by the acceptor, and that the French law is not that which it was assumed to be in *Trimbey v. Vignier*. I think the judgment of the Court of Common Pleas should be reversed.

KELLY, C. B. I also think the judgment of the court below was

wrong. We must not, however, be understood as holding that the law of a foreign country is not to be proved as a matter of fact. In the present case, though we have the opinions of French advocates, it is agreed between the parties that the whole of the Code de Commerce is to be considered as before us. We are at liberty, therefore, to examine the code for ourselves, and put the best construction we can upon it. Passing by article 137, the 138th article is in these terms: "Si l'endossement n'est pas conformé aux dispositions de l'article précédent, il n'opère pas le transport, il n'est qu'une procuration." The blank indorsement does not operate as a complete transfer of the bill, but only as a procuration. What is the effect and meaning of a procuration, as contradistinguished from a complete transfer of the property in the bill? It would, I think, be an extremely rash thing to put a construction upon that expression without consulting the commentaries made upon the code by French jurists and the judgments of the courts of France. In addition to the authorities cited by the Lord Chief Justice, I would refer to Nougier, *Lettres de Change*, ed. 1851, vol. i. p. 418, and Bravard-Veyrieres, par Demangeat, vol. iii. lib. 1, tit. viii., § 2, pp. 176, 177, ed. 1862. From the language of those commentaries and those judgments, I think it must be inferred that it is competent to the indorser under a blank indorsement to sue upon the bill or note in his own name, provided it is for the benefit of the immediate indorser. I think the plaintiff is entitled to judgment.

CHANNELL, B. Upon the materials before us, I also think the plaintiff is entitled to judgment. It appears that by the French law the indorsement of these bills by Gellet to the plaintiff is not sufficient to operate as a transfer of the bills, but amounts only to a procuration. But the defendant has failed to satisfy me that the law of France disentitles the plaintiff to sue him. The French advocate who was examined at the trial was not asked whether the effect of article 138 of the Code de Commerce was to prevent an action being maintained by the plaintiff in his own name, or whether the form of indorsement merely entitled the party sued to set up certain defences.

BLACKBURN, J. I agree with my brother Channell that it lay upon the defendant to prove that the French law disentitles the plaintiff to sue upon these bills in his own name, and that he has failed to do so. It seems to have been taken for granted by the Court of Common Pleas, in *Trimbey v. Vignier*, that a blank indorsement gives no title to sue on the bill. The opinion of one of the French advocates in that case was exactly the contrary, and that of the other was not necessarily inconsistent with it. In deciding as they did, the court seem to me to have fallen into a mistake of fact. The judgment

below assumes that case to have been correctly decided. I rest my judgment on this, that there was no evidence to show that by the law of France there is any impediment to the plaintiff's right to sue upon these bills. I think the judgment of the court below must be reversed, and that the plaintiff is entitled to a verdict.

MELLOR and LUSH, JJ., and CLEASBY, B., concurred.

Judgment reversed.

LODGE v. PHELPS.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1799.

[Reported in 2 Caines' Cases, 321.¹]

THE question in this case was, Can the assignee of a promissory note given in Connecticut maintain a suit upon it here in his own name, since he is not permitted to do so there?

Per Curiam, delivered by KENT, J. That personal contracts, just in themselves, and lawful by the law of the land where made, are to be fully enforced according to the intent of them, notwithstanding any change of habitation by the parties, is a principle of justice and of social policy which ought everywhere to be received and supported. But the admission of the *lex loci contractûs* can have reference only to the nature and construction of the contract, and not to the mode of enforcing it; for every country must and will have precedents and judicial forms peculiar to itself, and under the solemnity of these forms will enforce contracts according to their true intent and spirit.

The note on which the present suit was brought was made payable to the payee or his order, and he ordered the money to be paid to the plaintiff: the plaintiff, therefore, by the rules of equity, not only in Connecticut, but in every country where equity is known, is entitled to receive the money in preference to the original payee. What just reason can there then be, that the plaintiff should not be permitted to avail himself here of the forms and remedies prescribed by our laws, and to sue directly in his own name for the money, but should rather be compelled, agreeably to the usage of Connecticut, to use the name of the original payee as a mere nominal plaintiff, or *dramatis persona*? If the defendant has any defence, authorized by the law of Connecticut, let him show it; and he will be heard in the one form of action as well as in the other. Agreeably to the principle I have laid down, I am for allowing him every defence that he would have been entitled to make in Connecticut, had the note been sued there in the name of the original payee; and, as long as this can be done, I do not perceive any sufficient reason for turning the plaintiff round to another suit. To permit innovations upon our forms of action, when not necessary, may lead to inconvenience.

*Judgment for the plaintiff.*²

¹ 1 Johns. Cas. 139, s. c. — ED.

² Grace v. Hannah, 6 Jones (N. C.), 94, 96 (*semble*), *accord*.

Conf. Warren v. Copelin, 4 Met. 594, 597; Woods v. Ridley, 11 Humph. 194. — ED.

GORMAN W. FOSS AND ANOTHER v. WILLIAM G. NUTTING
AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1860.

[Reported in 14 Gray, 484.]

ACTION of contract upon two promissory notes made by the defendants in New York, payable to their own order, and indorsed in blank. Answer: an assignment in New York, before the commencement of this action, of all the plaintiff's right, title, and interest in the notes declared upon; and a denial of the plaintiff's ownership.

The defendants interrogated the plaintiffs under Stat. 1852, c. 312, § 61, whether they had made such an assignment, but the plaintiffs did not answer. At December, 1858, of the Court of Common Pleas in Essex, the defendants moved that they be ordered to do so, or be nonsuited. But Perkins, J., overruled the motion, on the ground that the interrogatories were immaterial. A verdict was taken for the plaintiffs, and the defendants excepted.

S. H. Phillips, for the defendants. 1. By the laws of New York, all choses in action are assignable, and "every action must be prosecuted in the name of the real party in interest." 2 Rev. Stats. of N. Y. (4th ed.), pt. 3, c. 4, § 111. Upon the question of the right of the assignee to recover, the *lex loci contractus* must govern. The evidence was therefore material. Story, Confl., §§ 565, 566, and cases cited; *O'Callaghan v. Thomond*,¹ *Ingraham v. Geyer*,² *Field v. Mayor, &c.*, of New York,³ *Ward v. Morrison*,⁴ *Burlock v. Taylor*,⁵ *Vanbuskirk v. Hartford Fire Ins. Co.*⁶

2. The practice act makes the affidavit of the interrogating party conclusive of the materiality of the information sought. Stats. 1852, c. 312, § 61.

S. B. Ives, Jr., for the plaintiffs.

HOAR, J. The interrogatories proposed by the defendants were only material in case the assignment in New York of a promissory note, made and payable in that State, but not indorsed, would be a bar to an action upon it in this Commonwealth in the name of the payee. By the law of New York, "every action must be prosecuted in the name of the real party in interest," with an exception not material to this inquiry; and the defendants contend that this pro-

¹ 3 Taunt. 82.

² 2 Selden, 179.

³ 16 Pick. 340.

⁴ 13 Mass. 147.

⁵ 25 Vt. 593.

⁶ 14 Conn. 141.

vision affects the contract, and not the remedy only, and so must be decided *secundum legem loci contractus*.

We do not regard this as a question of property, or of the right of the assignee to recover the amount of the note, but merely as presenting the question in whose name an action upon the contract shall be brought in this Commonwealth; and in this we think the *lex fori* must govern.

In *O'Callaghan v. Thomond*,¹ it was held that the assignee of an Irish judgment by *cognovit* might sue in England in his own name, under the provisions of the Irish statutes of 9 & 25 Geo. II.

But, in *Folliott v. Ogden*,² Lord Loughborough said that "a bond could only be sued for according to the laws of England relating to bonds," and therefore held that when a bond made in a foreign State, by whose laws it is assignable, is sued at law in England, the suit must be according to the laws of England, in the name of the obligee, and not of the assignee, although it be for his use, because there bonds are not assignable at law.³ The authority of this case was recognized by Ch. J. Parsons, in *Pearsall v. Dwight*.⁴

In *Dawes v. Boylston*,⁵ this court held that an assignment under the

¹ 3 Taunt. 82.

² 1 H. Bl. 123.

³ The judgment in this case was affirmed upon a writ of error. *Ogden v. Folliott*, 3 T. R. 726. But the *ratio decidendi* of the Court of Common Pleas was disapproved, Lord Kenyon remarking (p. 731): "If we were to consider the acts of the province of New York as binding, as has been contended, I am at a loss to know why all the property of those persons which was said to be confiscated did not pass to the executive power of that State to whom it was said to be forfeited; and why an action might not have been brought in the name of such executive power to enforce the payment of this bond; and how an action could have been brought in the name of the obligee. Having said thus much on the judgment supposed to have been given by the Court of Common Pleas, I can only say that at present I cannot assent to the reasoning on which that court gave judgment, though I am of opinion that it should be affirmed on different grounds." This opinion of Lord Kenyon, notwithstanding a dictum of Lord Ellenborough to the contrary, in *Wolff v. Oxholm*, 6 M. & S. 99, must be regarded as an established doctrine of the English courts. *Smith v. Buchanan*, 1 East, 11 (*semble*); *O'Callaghan v. Thomond*, 3 Taunt. 82; *Alivon v. Furnivall*, 1 C. M. & R. 296, *per* Parke, B.; *Thompson v. Bell*, 3 E. & B. 236. In the last case, one who had assigned a chose in action in California sued the debtor in England. The defendant pleaded the assignment in bar. Lord Campbell, C. J., said (p. 246): "A chose in action, not assignable by the law of England, is so by the law of California; and what does that mean, but that all right which the assignor has he gives to the assignee? If so, the assignee has the right exclusively. The case is like the indorsement of a bill of exchange; the indorser cannot sue; the indorsement would be a bar the world over. If, therefore, the plea shows such an assignment as vests all the assignor's right in the assignee, it is good." See also *Vanquelin v. Bonard*, 15 C. B. N. S. 365, 373; *Scuerhop v. Schmanuel*, 4 D. & Ry. 180; *Tenon v. Mars*, 3 M. & Ry. 38. — Ed.

⁴ 2 Mass. 90.

⁵ 9 Mass. 346.

English bankrupt law, effectual to vest in the assignees the beneficial interest and property, "would not be allowed, with us, the operation which such an assignment has in England, of giving to the assignees a remedy in their own names upon the debt assigned."

The same principle is stated by Ch. J. Kent, in *Bird v. Carital*,¹ and seems to be the settled law of New York. *Raymond v. Johnson*.²

The converse of the proposition, but supported by the same reason, that the *lex fori* governs the remedy, is found in decisions where it has been held that a promissory note payable to order, though made in a country where such a note is not negotiable, if sued where such notes are negotiable, may be sued by the indorsee in his own name. *Milne v. Graham*, *Lodge v. Phelps*.

No case has been cited to support the position that a suit cannot be brought in this Commonwealth in the name of the payee of a promissory note not indorsed, even if it could also be brought in the name of his assignee.

The suggestion of the defendant's counsel, that the affidavit of the party interrogating is conclusive as to the materiality of the information sought, we cannot adopt. Such an affidavit is required by the statute, as a security against frivolous or vexatious examinations of a party by his opponent; but the right to interrogate is expressly limited by the statute to "the discovery of facts and documents material to the support or defence of the suit." Stat. 1852, c. 312, § 61.

*Exceptions overruled.*³

¹ 2 Johns. 345.

² 11 Johns. 488. In *Holmes v. Remsen*, 4 Johns. Ch. 460, 485, Chancellor Kent recognized the right of foreign assignees to sue in New York in their own names; and his later opinion, rather than his first, seems to be the settled law of New York. *Abraham v. Plestoro*, 3 Wend. 538, 550, 560, 561, 567; *Hoyt v. Thompson*, 1 Seld. 320; *Peterson v. Chemical Bank*, 29 How. Pr. 240; *Hunt v. Jackson*, 5 Blatchf. 349. — Ed.

³ *Blane v. Drummond*, 1 Brock. 62; *Brush v. Curtis*, 4 Conn. 312; *Roosa v. Crist*, 17 Ill. 450; *Richards v. New York R. R.*, 98 Mass. 92 (*semble*); *Kirkland v. Low*, 33 Miss. 428, *accord*.

To the same effect are *McRae v. Mattoon*, 10 Pick. 52 (*semble*); *Byrne v. Walker*, 7 S. & R. 483; *Merrick's Estate*, 5 W. & S. 9, 19 (*semble*); *Fisk v. Brackett*, 32 Vt. 798.

But see *Elderkin v. Elderkin*, 1 Root, 139; *Bowne v. Olcott*, 2 Root, 353; *Goff v. Billinghamurst*, 2 Root, 527; *Stuart v. Greenleaf*, 3 Day, 311; *Upton v. Hubbard*, 28 Conn. 274, 284 (*semble*); *Mason v. Homer*, 105 Mass. 116; *Milne v. Moreton*, 6 Binn. 353, 374 (*semble*), and cases cited *supra*, 384, note 3, *contra*. — Ed.

SECTION III.

By whom the Transfer should be made.

STONE v. RAWLINSON.

IN THE COMMON PLEAS, EASTER TERM, 1745.

[*Reported in Willes, 559.*]

THIS was an action on a promissory note for fifty guineas, made by the defendants, dated the 11th of May, 1730, and payable to James Watson, or order; and the declaration stated that Watson died on the 1st of April, 1734, intestate, upon whose death administration of his goods and chattels was granted to Ann Webb, who indorsed the note to the plaintiff.

To this declaration the defendants demurred, and showed for cause that the plaintiff did not bring into the court or show to the court any letters of administration of J. Watson's goods granted to Ann, and that he did not show who granted administration of Watson's effects to the said Ann.

This case was twice argued, the first time in Michaelmas term, 1744, by *Agar*, Serjt., for the defendant, and *Draper*, Serjt., for the plaintiff; the second, in Hilary term following, by *Birch*, King's Serjt., for the former, and by *Prime*, King's Serjt., *contra*. And though Mr. J. Burnett appears at first to have been inclined to give judgment for the defendant, he afterwards agreed with the rest of the court, whose opinion was now delivered as follows, by

WILLES, L. Ch. J. This comes before the court on a demurrer to the plaintiff's replication.

There are two causes of demurrer assigned in the pleadings.

First, that there is no *profert* made of the letters of administration.

Secondly, that it is not said by whom the letters of administration were granted; so that it does not appear whether they were granted by proper authority.

And a third was made at the bar, that an executor or administrator cannot assign a promissory note made payable to a person or order, so as to enable the indorsee to bring an action on such note in his own name by the Statute 3 & 4 Anne, c. 9.

As to the two first objections, which are the only causes assigned in the demurrer, we have given our opinions before.

For, as the letters of administration cannot be supposed to be in the custody or power of the indorser, he ought not to be obliged to produce them ; and, for the same reason, he need not show by whom they were granted. But, if the defendant stand trial, the plaintiff must not only produce the letters of administration in evidence, because it is the title under which he claims, but must likewise show whether they were granted by a court or a person having legal authority so to do ; otherwise, he cannot recover.

The third point, therefore, and the only one which remains to be considered, is whether the executor or administrator of a person to whom or to whose order a promissory note is made payable, can assign over such note so as to enable the indorsee to bring an action upon it in his own name. And as it was insisted, on the one hand, that though this has been frequently done by persons concerned in trade, yet it had never been controverted before ; so it was admitted on both sides that there has never been any judicial determination upon this point either one way or the other. And though several cases were cited as bearing some resemblance to this, I think that none of them were at all material in this case, except the case of *Moore and Manning*, in *Comyns*, 311, 312, of which I shall take notice presently.

As this is a matter which greatly concerns the trade and commerce of the nation, and as it has never been judicially determined before, we thought ourselves at liberty, and that it was the most proper method we could take to inquire of traders and merchants of undoubted credit what has been the practice in this case ever since the act of the third and fourth of *Queen Anne*, and how the act has been understood by them. We have done so ; and they all agree that it has been the constant practice for executors and administrators to indorse such notes and inland bills of exchange, and that promissory notes, when so assigned, have always been considered to be as much within the statute, and that they may be put in suit by the indorsees in the same manner as if they had been indorsed by the testator or intestate. As, therefore, we are fully satisfied that this has been the constant practice, and that the law has been always so understood amongst traders, and as the courts of law have always in mercantile affairs endeavored to adapt the rules of law to the course and method of trade in order to promote trade and commerce, instead of doing it any hurt, so we are determined in the present case to make this indorsement valid according to the practice, if we can by any means make it consistent with the words of the act and agreeable to the rules of law. And we think it is easy to do both.

The words of the act, when considered, will, I think, plainly warrant it, — I mean the following words, in the first section of the act : “ That

any person to whom a promissory note that is payable to any person or his order is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money either against the person signing such a note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange.” What was the practice before and since as to inland bills of exchange, we can only learn from the report of merchants; and they unanimously agree that they were always looked upon to be so assignable by executors and administrators as to enable the assignee to bring an action in his own name. And I think this construction agreeable to the plain intent of the act, which is that, whereas the assignee of such notes before had certainly an equitable interest, which would enable him to bring an action in the name of the assignor, such equitable interest by the statute was converted into a legal interest, so as to enable the assignee to bring an action in his own name. It must be admitted that the whole interest to the testator or intestate in such notes vests in the executor or administrator; and that before the statute the executor or administrator might have assigned all his right in such notes, so as to convey an equitable interest to another, and to enable him to sue in the name of the executor or administrator. If therefore, by the statute, such equitable interest is converted into a legal one, it follows that since the statute such assignee may sue in his own name. And I think that the case of *More and Manning*¹ in this court, and reported in *Comyns*, 311, 312, which was the only case that was cited which seems to bear any resemblance to this, plainly warrants this construction. A promissory note, drawn by Manning, was made payable to Statham, or his order. Statham assigned it to A, and A to the plaintiff: on a demurrer to the declaration, the exception was that the assignment was only to A, not saying to him or order, and therefore he could not assign it to the plaintiff. And to this the Chief Justice at first inclined; but afterwards it was resolved by the whole court that it was good. For if the original note were assignable, it will always remain so; and whoever has the whole interest in the note may assign it as he pleases.

On the strength of this case, I think I may make a syllogism, which will be conclusive in the present case. Whoever has the absolute property in a bill made payable to one, or his order, may assign it as he pleases within the provision of the statute; and such assignee may maintain an action in his own name. The executor or administrator of a person to whom such bill is made payable has the absolute property in it; and therefore he may assign it to whomsoever he pleases;

¹ 5 G. 1.

and such assignee may maintain an action in his own name, which is the only question that remains to be determined in the present case.

And, we being all of that opinion, judgment must be for the plaintiff.¹

CARVICK v. VICKERY.

IN THE KING'S BENCH, HILARY TERM, 1783.

[Reported in 2 Douglas, 653, note.]

THIS was an action by the indorsee of a bill of exchange, which was in the following form :—

“MR. ABRAHAM VICKERY.

“Two months after date, please to pay to us, or our order, the sum of, &c.

“JOHN MAYDWELL.

“JOHN MAYDWELL.”

It was indorsed thus :—

“JN. MAYDWELL.

“HOLLOWAY.”

The Maydwells were father and son. The indorsement was by the son. They were admitted not to be partners. The bill when due was presented to the defendant, and accepted; and, at the time of the acceptance, he wrote upon it a direction to his banker to pay it. The cause was tried, at the sittings after M. 23 Geo. III., at Guildhall, before Lord Mansfield, who nonsuited the plaintiff, because there was not an indorsement by both the parties to whose order the bill was made

¹ Affirmed in *Rawlinson v. Stone*, 3 Wils. 1. *Dwight v. Newell*, 15 Ill. 333; *Sanders v. Blain*, 6 J. J. Marsh. 446 (*semble*); *Malbon v. Southard*, 36 Me. 147; *Prosser v. Leatherman*, 5 Miss. 237, 241 (*semble*); *Miller v. Helm*, 10 Miss. 687, 696 (*semble*); *Wheeler v. Wheeler*, 9 Cow. 34; *Johnson v. Mangum*, 65 N. Ca. 146; *Mosely v. Graydon*, 4 Strob. 7; *Griswold v. Barnum*, 5 Vt. 269; *Cahoon v. Moore*, 11 Vt. 604, *accord*.

Stagg v. Linnenfelser, 59 Mo. 336, *contra*.

See *Edwards v. Campbell*, 23 Barb. 423; *Lounsbury v. Depew*, 28 Barb. 44; *Richardson v. Gower*, 10 Rich. 109.

Similarly, although an administrator can bring an action only in the jurisdiction where he has received letters of administration, one to whom he has transferred a bill or note may sue upon the instrument in other jurisdictions. *Harper v. Butler*, 2 Pet. 239 (*semble*); *Barrett v. Barrett*, 8 Greenl. 353; *Rand v. Hubbard*, 4 Met. 252, 258 (*semble*); *Andrews v. Carr*, 26 Miss. 577; *Owen v. Moody*, 29 Miss. 79; *Leake v. Gilchrist*, 2 Dev. 73; *Grace v. Hannah*, 6 Jones (N. Ca.), 94.

But see *contra*, *Stearns v. Burnham*, 5 Greenl. 261 (overruled); *Thompson v. Wilson*, 2 N. H. 291; *Lee v. Havens*, *Brayton*, 93.

The title to a bill indorsed to A, in ignorance of A's death, vests in his representative. *Murray v. E. I. Co.*, 5 B. & Al. 204. — Ed.

payable. In H. 23 Geo. III., Howorth obtained a rule to show cause why there should not be a new trial; and the case was argued, on Saturday, the 1st of February, 1783, by *Wallace* and *Law*, for the defendant, and *Howorth*, and *Wood*, for the plaintiff.

In support of the nonsuit, it was insisted, that it was clear, when two or more persons are the payees of a bill of exchange (which in this case the drawers were), and there is no partnership between them, the indorsement of one will not bind the rest, nor make the bill negotiable. The only reason for the names of both the father and the son appearing to this bill must have been to prevent its being paid without the joint order of both. Even if the indorsement had been specially by the one, to pay for himself and the other, yet, without evidence of a partnership, the other would not have been bound. The first promise of the acceptor was to pay to the order of *two*, and a new promise to pay to the order of *one* could not be raised, without a consideration. It would be a *nudum pactum*. Indeed, where there is a partnership, the acceptance of one partner does not bind the others, unless the bill concerns the partnership trade. This was determined in the case of *Pinkney v. Hall*.¹ The same thing must hold as to indorsements. If there is no case exactly on the subject, it is because the matter has never been doubted. *Whitcomb v. Whiting* may be cited on the other side; but it is not *ad idem*. The statute relative to promissory notes² only enables such servant or agent as is usually intrusted by the principal, to bind him by his signature.³ A partner's signature binds the partnership upon that ground; for every partner may be considered as an agent for the rest of the partnership.

On the other side, it was argued that two persons, by joining in the same bill, hold themselves out to the world as partners, and therefore for that purpose are to be treated and dealt with as such. It appears by the evidence that the acceptance and order to the banker were after the indorsement: that order, therefore, amounted to a recognition of the power of the one to bind the other. Besides, the son had the custody of the bill, which implied an authority from the father to negotiate it. They cited *Whitcomb v. Whiting*.

LORD MANSFIELD. I have looked into that case, and do not think it *ad idem*. The general question is of great importance; viz., whether an undertaking, by a bill of exchange, to pay A and B is an undertaking to pay A or B. We will therefore take some time to consider of it. As to the order to the banker, it seems to me nothing more than a direction to pay to persons properly authorized.

WILLES, J. I incline to think the order to the banker a recognition of the indorsement.

¹ B. R. 8 W. 3. 1 Salk. 126.

² 3 & 4 Anne, c. 9.

³ § 1.

ASHHURST, J. I do not think the order acknowledges the authority of the indorsement. If the banker had afterwards discovered that the indorsement was forged, he might have refused payment. (Wallace had mentioned a case from Bristol, of a draft on Messrs. Hoares, accepted by Messrs. Childs, where that happened.)

BULLER, J. I think the order to the banker makes no difference. But it seems to me that, when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such than to permit them to deny that they are so.

The court took time to deliberate till Tuesday, the 4th of February, when Lord Mansfield delivered their unanimous opinion, that the Maydwells, by making the bill payable "*to our order*," had made themselves partners to this transaction.

The rule made absolute.

At the ensuing sittings at Guildhall, on Monday, March 3, 1783, the new trial came on, before Lord Mansfield and a special jury; when Wallace, for the defendant, stated and offered to prove that, by the universal usage and understanding of all the bankers and merchants in London, the indorsement was bad because not signed by both the payees.

Howorth, on the other side, objected to any evidence of that sort; insisting that the point was a question of law, and had been decided by the court.

LORD MANSFIELD said he did not think the question was so decided as to preclude the evidence offered, and therefore overruled the objection.

Wallace then called Mr. Gosling, an eminent banker, to prove the usage; but the jury, *una voce*, declared they knew it perfectly to be as he had stated it; and, without hearing the witness, found a verdict for the defendant.¹

¹ The law is now well settled in accordance with the usage found by the jury. *Jones v. Radford*, 1 Camp. 83, n.; *Dwight v. Pease*, 3 McL. 94; *Shepard v. Hawley*, 1 Conn. 367 (*semble*); *Lowell v. Reding*, 9 Greenl. 85 (*semble*); *Cooper v. Bailey*, 52 Me. 230 (*semble*); *Bennett v. McGaughy*, 4 Miss. 192; *Foster v. Hill*, 36 N. H. 526, 529; *Wood v. Wood*, 1 Harr. 428; *Willis v. Green*, 5 Hill, 234 (*semble*); *Martin v. Hayes*, Busbee, 423; *Sayre v. Frick*, 7 W. & S. 383 (*semble*); *Quinby v. Merritt*, 11 Humph. 439. See *Snelling v. Boyd*, 5 Monr. 172, 173 (*semble*), *contra*.

Conf. *Finch v. De Forrest*, 16 Conn. 445 (a note payable to A. and indorsed by A. & Co. Held a good transfer.)

In regard to indorsements by executors, a distinction is to be observed. If the

WALLACE v. HARDACRE.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 9,
1807.

[Reported in 1 Campbell, 45.]

ASSUMPSIT against the defendant as acceptor of a bill of exchange, dated 23d March, 1807, for £319 10s., drawn by Edward Maine, at two months, payable to his own order, and indorsed by him to the plaintiff.

Proof being given of the defendant's handwriting to the bill, that Maine had indorsed it by procuration, and that at the time of the indorsement Maine was largely indebted to the plaintiff,

There were two defences set up to the action. First, that the plaintiff was not a *bona fide* holder of the bill.¹ The second ground was that Maine had committed an act of bankruptcy before the bill was delivered to the plaintiff, and that no interest, therefore, could be conveyed by his indorsement. It was allowed that, according to the case of *Lempriere v. Pasley*,² if the bill had been deposited with the plaintiff by Maine while solvent, he might have put his name upon it as indorser, committing an act of bankruptcy; but it was insisted that the indorsement was a mere nullity, as he had become bankrupt before parting with the possession of it.

LORD ELLENBOROUGH. The bill could not pass under the commission, being of no value in the hands of the bankrupt. There having been no consideration between him and the acceptor, he could not have sued upon it himself, and no right of action in respect of it could vest in his assignees. But the bill must be available in the hands of the plaintiff, who has given a valuable consideration for it; and the acceptor is here, as in other cases of accommodation bills, barred of that defence which he might have set up to an action at the suit of one of the original parties to it. *Smith v. Pickering*.

The defendant's counsel then maintained that the bankrupt had a

bill or note is made payable to executors, the indorsement of all is requisite to the transfer. *Sanders v. Blain*, 6 J. J. Marsh. 446; *Smith v. Whiting*, 9 Mass. 334; *Johnson v. Mangum*, 65 N. Ca. 146. But see *Bogert v. Hertell*, 4 Hill, 492, 506, *contra*; and conf. *Winterbottom's Case*, 2 C. & K. 37; *Pease v. Dwight*, 6 How. 194.

If, however, the bill or note is payable to the testator, the indorsement of any one of several executors will transfer the title to the instrument. *Dwight v. Newell*, 15 Ill. 333 (*semble*); *Sanders v. Blaine*, 6 J. J. Marsh. 446; *Wheeler v. Wheeler*, 9 Cow. 34; *Johnson v. Mangum*, 65 N. Ca. 146; *Mosely v. Graydon*, 4 Strob. 7. — ED.

¹ The first defence was based upon the alleged illegality of the transaction between Maine and the plaintiff. So much of the case as relates thereto is omitted. — ED.

² 2 T. R. 485.

valuable property in the bill, and that it therefore passed under the commission as part of his effects; for this reason, that the defendant had received a cross acceptance of Maine's as a consideration for accepting this bill; and that, though that acceptance had produced nothing, it prevented the bill from being an accommodation bill, and gave the defendant a set-off against the assignees of the bankrupt.¹

But the *Attorney-General*, on the other side, protested strongly against this mode of blowing hot and cold; and, the cross acceptance not being properly made out, the plaintiff had a verdict.²

COTES v. DAVIS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 2,
1808.

[*Reported in 1 Campbell, 485.*]

ACTION by the indorsee against the maker of a promissory note for £24 17s., payable to "Mrs. Carter, or order," and indorsed by her in the name of "M. Carter."

Evidence was given of the handwriting of the maker, and of the payee, who was proved to pass in the world by the name of Mrs. Carter. It likewise appeared that the plaintiff had given a valuable consideration for the note; that when it was presented for payment by a notary, with the indorsement upon it, the defendant said it should be paid in a few days; and that he afterwards asked for further time when the action was commenced and the declaration had been delivered.

Garrow, for the defendant, offered to prove that Mrs. Carter, the payee, was the wife of a man of the name of Cole, who was still alive; and contended that, if this fact was established, the plaintiff must be nonsuited. It had been decided that no title to a bill of exchange or promissory note could be made through the indorsement of a *feme covert*; and what the defendant said after the bill had become due must be immaterial, if he was not previously liable.

LORD ELLENBOROUGH. The husband may authorize the wife to indorse bills of exchange or promissory notes, as his agent; and, after the acknowledgments and promises of the defendant in this case, it

¹ *Rolfe v. Caston*, 2 H. Bl. 570; *Cowley v. Dunlop*, 7 T. R. 565; *Buckler v. But-
tivant*, 3 East, 72; *Kent v. Lowen*, 1 Camp. 177, 180 d.

² *Arden v. Watkins*, 3 East, 317; *Willis v. Freeman*, 12 East, 656; *Ramsbotham
v. Cator*, 1 Stark. 228 (*semble*), *accord.* — ED.

may reasonably be presumed against him that Mrs. Carter had authority from her husband to indorse the note in question.

Garrow. But in that case the indorsement ought to have been in the name of the husband.

LORD ELLENBOROUGH. We may fairly carry the presumption one step farther, and presume that the husband authorized her to indorse notes in the name by which she herself passed in the world. The defendant is now estopped from contesting her authority for this indorsement.

*Verdict for the plaintiff.*¹

MASON v. MORGAN.

IN THE KING'S BENCH, NOVEMBER 6, 1834.

[Reported in 2 *Adolphus & Ellis*, 30.]

ASSUMPSIT. The first count of the declaration stated that the defendant on, &c., made his promissory note payable to Sarah, then and still the wife of John Barnard, or order, and that John Barnard indorsed it to the plaintiff. The second count stated the note to have been made payable to John Barnard, or order, and that John Barnard indorsed. The third count stated that Sarah Ann, the wife of the plaintiff, while she was unmarried, had advanced money to the defendant; that the defendant, to secure it, and while Sarah Ann was unmarried, had made the promissory note for the amount payable to Sarah, then and still the wife of John Barnard, or order, and delivered it to her in trust, and for the use and benefit of Sarah Ann; that, before the bill became due, the plaintiff intermarried with Sarah Ann, and became thereby entitled to have the note indorsed to him, and that John and Sarah Barnard indorsed it to him. Pleas to each count severally: that the defendant did not make the promissory note in the three counts mentioned in manner, &c. On the trial before Lord Denman, C. J., at the adjourned sittings at Guildhall, after Trinity term last, it was proved that the note was payable to Sarah Barnard, and that John Barnard had indorsed it singly. The counsel for the defendant objected that Sarah Barnard ought to have in-

¹ *Prestwick v. Marshall*, 7 Bing. 565; *Prince v. Brunatte*, 1 B. N. C. 435; *Roland v. Logan*, 18 Ala. 307; *Stevens v. Beals*, 10 Cush. 291; *Menkens v. Heringhi*, 17 Mo. 297; *McClain v. Weidemeyer*, 25 Mo. 364; *Miller v. Delamater*, 12 Wend. 433; *Harris v. Culver*, 9 B. Mon. 365; *Phillips v. Wilks*, 36 N. Y. Sup. Ct. 254 (*semble*), *accord*.

Savage v. King, 17 Me. 301 (overruled), *contra*.

In *Hancock Bank v. Joy*, 41 Me. 568, a husband was held liable as indorser upon an authorized indorsement by wife in her own name of a bill payable to her order. — Ed.

dorsed also; but his Lordship overruled the objection; and a verdict was taken for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit.

Godson now moved accordingly. In *M'Neilage v. Holloway*, it was held that the husband of a woman to whom a bill had been made payable while she was sole, and who had married before its maturity, might sue alone, without the wife's indorsement. But Abbott, J., does not appear to have altogether assented to the reasons given by the rest of the court; and the authority of the case was questioned by him afterwards in *Richards v. Richards*.¹ There it was held that a woman who had advanced money which she had received as administratrix to her husband, and had taken a joint and several note from him and two others, payable to herself by way of security, might sue the two others after her husband's death. [PATTESON, J. It has been held that she could not indorse alone during her coverture. *Connor v. Martin*.²] That is admitted; but the indorsement of both husband and wife is necessary, that the continuation of interest from party to party may appear on the instrument.

LORD DENMAN, C. J. A party who takes such an instrument is to satisfy himself that he takes it from the actual owner; and that is all he need do. There is no ground for the rule.

TAUNTON, PATTESON, and WILLIAMS, JJ., concurred.

*Rule refused.*³

¹ 2 B. & Ad. 453.

² 1 Stra. 516, Easter Term, 1728. [The plaintiff declared upon a promissory note made to a *feme covert* (a), and indorsed by her to him, and on argument judgment was given for the defendant, the right being in point of law vested in the husband, and the wife having no power to dispose of it.] *Jeffrey v. Mattheson* (Court of Session), June 28, 1826; *Ingham v. White*, 4 All. 412; *Kenworthy v. Sawyer*, 125 Mass. 28, *accord*. In the last two cases the note was executed to the wife by the husband.

A bill or note given by a married woman is, of course, absolutely void. *Loyd v. Lee*, 1 Stra. 94; *Cannam v. Farmer*, 3 Ex. 698; *Bauer v. Bauer*, 40 Mo. 61; *Scudder v. Gori*, 18 Abb. Pr. 223; *Loomis v. Ruck*, 56 N. Y. 462; *Sim v. Gibb* (Court of Session), Nov. 25, 1825; *Walker v. Elder* (Court of Session), Dec. 4, 1827.

Even when by statute a married woman may contract as a *feme sole* with every one but her husband, no one can acquire a title to sue her upon a note executed by her to her husband and indorsed by him. *Roby v. Phelon*, 118 Mass. 541.

(a) According to a note of this case taken by Mr. Justice Denison, while in court, and cited by him in *Rawlinson v. Stone*, 8 Wils. 5, the promissory note was given to the wife before her marriage. — Ed.

EBENEZER R. ESTABROOK v. WILLIS SMITH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1856.

[Reported in 6 Gray, 570.]

ACTION of contract upon a promissory note, made by the defendant, payable to "Estabrook & Richmond, or order," and indorsed by Richmond in his own name, for the purpose of transferring his interest therein to his copartner, Estabrook, the plaintiff. The parties submitted to the decision of the court the question, whether this indorsement was sufficient to enable the plaintiff to maintain an action thereon in his own name.

D. Foster, for the plaintiff. One of two partners, or other joint-payees of a promissory note, may indorse the same in his own name to the other, and thereby enable the latter to maintain an action thereon. There is no difference in this respect between partners and other joint-payees; for a note, payable to two jointly, makes them partners as to this transaction. *Russell v. Swan*,¹ *Goddard v. Lyman*.² To require the plaintiff's own name to be indorsed on the note would in effect compel him to indorse it to himself.

E. Washburn, for the defendant.

DEWEY, J. We take the rule to be uncontroverted, that a promissory note, payable "to A. B., or order," cannot be transferred, so as to give a right of action in the name of a holder, not the original party, without an indorsement by the payee. The application of this principle seems to be decisive against the right of the plaintiff alone to maintain this action. The action is brought by Estabrook upon a note made to a copartnership, — Estabrook & Richmond, — promising them, by the name of their copartnership, to pay them or order a certain sum of money. That this action cannot be maintained by the plaintiff as payee of the note is obvious, as that would at once present a case where there was an omission to join all the payees as plaintiffs, which would be fatal to the action. The only question, therefore, is whether this note is legally indorsed, so as to enable the plaintiff to maintain the action as indorsee.

The payees of the note are Estabrook & Richmond, who compose a partnership. An indorsement of the note by the payees would therefore be an indorsement by Estabrook & Richmond; and this would correspond with the form of the note, and transfer the same to their indorsee. One partner might properly transfer the note by indorsement; but he must do it by indorsing the partnership name. Any

¹ 16 Mass. 314.

² 14 Pick. 268.

thing less than this seems to be an irregularity, and a departure from the legitimate mode of transfer of a negotiable note or bill, payable to the order of a copartnership.¹

It is not contended that the indorsement by Richmond alone would have been sufficient to authorize an action in the name of a third person as indorsee; but it is urged that such indorsement is sufficient to authorize an action by the other partner — Estabrook — as indorsee. The position taken is, that Richmond, by his indorsement, has parted with all his interest, and so vested the entire note in Estabrook. This may be all true as between Richmond and Estabrook, and might be quite sufficient to settle, as between them, to whose use this money was to be held when collected. But the question still recurs, as to the effect of such an indorsement as against the maker of the note, and whether it creates the legal relation of indorsee. As already remarked, the present action, if maintainable at all, is maintainable by Estabrook as indorsee of the note. To constitute a legal indorsement, the payees Estabrook & Richmond must be the indorsers. But no such indorsement has ever been made. No one has professed to indorse the note in the partnership name. The only indorsement is that of Richmond individually; and although it might be quite competent for the payees Estabrook & Richmond in their partnership name to have indorsed it to Estabrook, yet they have not done so.

We have found no authority for maintaining an action by an indorsee, under such circumstances. The case of *Goddard v. Lyman*, which seems to be the most favorable case cited to sustain the position taken by the plaintiff, was widely different from the present case. In that case, although the original indorsement was by two only of three payees, and made to the other payee and a third person, yet it was subsequently indorsed by the third payee, and came to the hands of the plaintiff, who instituted the suit with the indorsement of all the payees. That case upon its facts does not, therefore, furnish any precedent for this case; although some of the remarks, as found in the opinion of the court, might seem to indicate a broader doctrine than the case required.

The plaintiff then had leave to amend, on terms, by joining the other partner, and had —

*Judgment for the amount of the note.*²

¹ *Planters' Bank v. Willis*, 5 Ala. 770; *Alabama Co. v. Brainard*, 35 Ala. 476; *Cooper v. Bailey*, 52 Me. 230, *accord*. But see *Wartells v. Hudson*, 8 La. An. 486; *McConeghy v. Kirk*, 68 Pa. 200, *contra*. On the death of a partner the indorsement should be in the name of the surviving partners only. *Jones v. Thorn*, 14 Mart. 113. — ED.

² *Miller v. Bledsoe*, 2 Ill. 530; *Foster v. Hill*, 36 N. H. 526; *Regan v. Jones*, 1 Wyoming, 210 (*semble*), *accord*.

Bolton v. Burnett, 5 Blackf. 222; *Carleton v. Byington*, 17 Iowa, 579; *Goddard v. Lyman*, 14 Pick. 268 (*semble*); *Sneed v. Mitchell*, 1 Hayw. (N. Ca. 289), *contra*. — ED.

SECTION IV.

Purchase for Value without Notice.(a) TITLE.¹

ANONYMOUS.

AT NISI PRIUS, CORAM HOLT, C. J., 1698.

[Reported in 1 Lord Raymond, 738.]

A BANK-BILL was payable to A. or bearer; A. gave it to B., who lost it; C. found it, and assigned it over to D. for valuable consideration; D. went to the bank, and got a new bill in his own name; A. brought trover against D. for the former bill. And ruled by Holt, C. J., at Guildhall, 1698, that an action did not lie against D., because he held it for valuable consideration.

*Ex relatione m'ri Daly.*²

¹ The cases brought together under this caption might have been arranged with advantage in two sections, entitled respectively: Purchase for value without notice as a source of title, and purchase for value without notice as a bar to defences. The former would include, first, the cases in which a purchaser for value without notice acquires a title to negotiable paper, although his transferor has no title as in the case of paper negotiable by delivery merely, and purchased of a finder or thief; secondly, the cases in which the transfer by one who has no property in the paper passes no title even to a purchaser for value without notice, as in the case of a forged or unauthorized indorsement of paper negotiable only by indorsement. (a)

The latter of the two sections would include, first, the cases in which a purchaser for value without notice would acquire a title discharged of defences, to which it was subject in the hands of his transferor in favor of prior parties, as in the case of fraud, failure of consideration and other equitable or *personal* defences; secondly, the cases in which the defences would attach to the paper even in the hands of a purchaser for value without notice, as in the case of alteration and other legal or *real* defences.

Furthermore, the cases *Jenys v. Fowler*, *infra*, 399; *Price v. Neal*, *infra*, 807; *Bass v. Clive*, *infra*, 466; *Thiedemann v. Goldschmidt*, *infra*, p. 534; *Marine Bank v. Nat. City Bank*, *infra*, 587; *Louisiana Bank v. Citizens' Bank*, *infra*, 601, belong properly in chapter VI., section I.; and *Mechanics' Bank v. Straiton*, *infra*, 574, belongs in chapter IV., section I. — ED.

² *Anon.*, 1 Salk. 126; *Adkins v. Blake*, 2 J. J. Marsh, 40, *accord.* — ED.

(a) By a strictly scientific classification this latter class of cases would properly fall into chapter IV., section III. — ED.

JENYS v. FAWLER AND ANOTHER.

AT NISI PRIUS, AT GUILDHALL, CORAM RAYMOND, C. J., HILARY TERM, 1733.

[Reported in 2 Strange, 946.]

IN an action by the indorsee of a bill of exchange against the acceptor, it was held not to be necessary to prove the hand of the drawer; and the plaintiff rested on the proof of the acceptance. The defendant offered to prove it a forged bill, by calling persons who were acquainted with the hand of the drawer, and would swear they did not believe it to be his hand. But the Chief Justice would not admit this, from the danger to negotiable notes, and because a man might with design write contrary to his usual method. And he strongly inclined that even actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee.

*Strange pro quer., who had a verdict.*¹

BOWYER v. BAMPTON.

IN THE KING'S BENCH, TRINITY TERM, 1741.

[Reported in 2 Strange, 1155.²]

UPON a case stated at Nisi Prius in an action by the plaintiff as indorsee of several promissory notes, it appeared that the notes were given by the defendant to one John Church, for money by him knowingly advanced to the defendant to game with at dice, and that Church indorsed them to the plaintiff for a full and valuable consideration, and that the plaintiff was not privy to, or had any notice, that any part

¹ Porthouse v. Parker, 1 Camp. 82; Sanderson v. Collman, 4 M. & Gr. 209; U. S. Bank v. Bank of Georgia, 10 Wheat. 333, 353; Hoffman v. Milwaukee Bank, 12 Wall. 181, 193; Redington v. Woods, 45 Cal. 406, 418; Peoria R.R. v. Neill, 16 Ill. 269, 270; McKleroy v. Southern Bank, 14 La. An. 458, 459; Stout v. Benoist, 39 Mo. 277, 281; Canal Bank v. Albany Bank, 1 Hill, 287, 294; Bank of Commerce v. Union Bank, 3 Comst. 280, 235; Holt v. Ross, 54 N. Y. 472, 475; Marine Bank v. City Bank, 59 N. Y. 67; White v. Continental Bank, 64 N. Y. 316, 320; Levy v. U. S. Bank, 1 Binn. 27, 36; Tradesman's Bank v. Third Nat. Bank, 66 Pa. 435, 438; Chambers v. Union Bank, 78 Pa. 205, 209; City Bank v. Nat. Bank, 45 Tex. 203, 218; St. Albans Bank v. Farmers' Bank, 10 Vt. 141, 145, accord. — ED.

² 7 Mod. 334, s. c. — ED.

of the money for which the notes were given had been lent for the purpose of gaming.

Upon this, a question arose upon the statute 9 Anne, c. 14, § 1, which says, "That all notes, where the whole or any part of the consideration is money knowingly lent for gaming, shall be void to all intents and purposes whatsoever,"¹ whether the plaintiff could maintain this action against the defendant. And after two arguments the court were of opinion he could not; for it is making it of some use to the lender, if he can pay his own debts with it: and it will be a means to evade the act, it being so very difficult to prove notice on an indorsee. And though it will be some inconvenience to an innocent man, yet that will not be a balance to those on the other side. And the plaintiff is not without remedy, for he may sue Church on his indorsement. And it is but the common hazard of taking notes of infants or *feme coverts*. As to what Holt said in *Hussey v. Jacob*, it was not the point adjudged, and the Chief Justice said he had seen a report wherein notice was taken, that all the learned part of the bar wondered at it.²

MILLER v. RACE.

IN THE KING'S BENCH, JANUARY 31, 1758.

[Reported in 1 Burrow, 452.]

It was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord Mansfield, at the sittings in Trinity term last at Guildhall, London; and upon the trial it appeared that William Finney, being possessed of this bank-note on the

¹ This statute was so far modified by 5 & 6 Geo. IV. c. 41, §§ 1 and 2, as to give, in effect, a title to one who acquired a bill or note for value and without notice of the gaming transaction between prior parties. See *Hay v. Ayling*, 16 Q. B. 423, 431. — ED.

² *Aliken v. Howell*, 1 Nev. & M. 191; *Shillito v. Theed*, 7 Bing. 405; *Hitchcock v. Way*, 6 A. & E. 943; *Lane v. Chapman*, 3 Per. & D. 668; *Henderson v. Benson*, 8 Price, 281; *White v. Johnson* (Court of Session), Jan. 22, 1819; *Elliott v. Cocks* (Court of Session), Nov. 24, 1826; *Hamilton v. Russel* (Court of Session), May 18, 1832; *Abrams v. Camp*, 4 Ill. 290; *Craig v. Andrews*, 7 Iowa, 17; *Unger v. Boas*, 13 Pa. 601, *accord*.

Hussey v. Jacob, 1 Ld. Ray. 87 (*semble*); *Neilson v. Bruce* (Court of Session), June 25, 1740; *Stewart v. Hyslop* (Court of Session), Feb. 18, 1741, *contra*. — ED.

11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty at Chipping Norton, in Oxfordshire; that on the same night the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them, as cash; and that, in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th of December applied to the Bank of England "to stop the payment of this note;" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this, the plaintiff applied to the bank for the payment of this note, and for that purpose delivered the note to the defendant, who is a clerk in the bank; but the defendant refused either to pay the note, or to redeliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of £21 10s. damages; subject, nevertheless, to the opinion of this court upon this question, "whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action."

Mr. Williams was beginning on behalf of the plaintiff; but LORD MANSFIELD said "that, as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir Richard Lloyd, for the defendant. The present action is brought, not for the money due upon the note, but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the money's being due to him as bearer. The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer, though each bearer may be considered as having obtained from the

bank a new promise. I do not say whether the bank can or cannot stop payment: that is another question. But the note is only an instrument of recovery. Now this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money: he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected "that this note is to be considered as cash in the usual course of trade." But still the course of trade is not at all affected by the present question about the right to the note. A different species of action must be brought for the note from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank for the money. In which action of trover, property cannot be proved in the plaintiff; for a special proprietor can have no right against the true owner. The cases that may affect the present are *Anonymous*,¹ *coram* Holt, C. J., at Nisi Prius at Guildhall. There Lord Chief Justice Holt held "that the right owner of a bank-bill, who lost it, might have trover against a stranger who found it; but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade, which creates a property in the assignee or bearer."² *Ford v. Hopkins*,³ *per* Holt, C. J., at Nisi Prius at Guildhall: "If bank-notes, exchequer-notes, or million lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action, into whatsoever hands they are come: money or cash is not to be distinguished; but these notes or bills are distinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them." Therefore, the true owner may seize these notes wherever he finds them, if not passed away in the course of trade.⁴

In Middlesex, *coram* Pratt, C. J., *Armory v. Delamirie*, a chimney-sweeper's boy found a jewel. It was ruled "that the finder has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." This note is just like any other piece of property, until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. Williams, contra, for the plaintiff. The holder of this bank-note, upon a valuable consideration, has a right to it even against the

¹ 1 Salk. 126.

² 1 Ld. Raym. 738, s. c., in which case the note was paid away in the course of trade; but this remains in the man's hands, and is not come into the course of trade.

³ 1 Salk 283, 284.

⁴ 1 Strange, 505.

true owner. 1st. The circulation of these notes vests a property in the holder, who comes to the possession of it, upon a valuable consideration. 2dly. This is of vast consequence to trade and commerce; and they would be greatly incommoded, if it were otherwise. 3dly. This falls within the reason of a sale in market overt, and ought to be determined upon the same principle. First, he put several cases, where the usage, course, and convenience of trade, made the law, and sometimes even against an act of Parliament. *Stanley v. Ayles*,¹ *per* Hale, C. J., at Guildhall. *Lumley v. Palmer*, where a parol acceptance of a bill of exchange was holden sufficient against the acceptor. Secondly, this paper credit has been always, and with great reason, favored and encouraged. *Jenys v. Fawler et al.* The usage of these notes is "that they pass by delivery only, and are considered as current cash; and the possession always carries with it the property." 1 Salk. 126, pl. 5, is in point. A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it. Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it, for want of title against a true owner, even if there was a chasm in the transfer of it through one only out of five hundred hands. Thirdly, this is to be considered upon the same foot as a sale in market overt. 2 Inst. 713: "A sale in market overt binds those that had right." But it is objected by Sir Richard "that there is a substantial difference between a right to the note and a right to the money." But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder of a note, has a right to the note; but, after circulation, the holder upon a valuable consideration has a right. We have a property in this note, and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases, and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or not in the course of trade, which is all that Lord Ch. J. Holt said in 1 Salk. 284. As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner, not against him.

Sir Richard Lloyd, in reply. I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner. This is not only without, but against the consent of the owner. Supposing this note to be a sort of mer-

¹ 3 Keb. 444.

cantile cash, yet it has an ear-mark, by which it may be distinguished : therefore, trover will lie for it. And so is the case of *Ford v. Hopkins*. And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper : it may be as well stopped, as any other sort of mercantile cash (as, for instance, a policy which has been stolen). And this has not been passed away in trade, but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away ; for this was not passed away. Here, the true owner, or his servant (which is the same thing), detains it. And surely robbery does not divest the property. This is not like goods sold in market overt ; nor does it pass in the way of a market overt, nor is within the reason of a market overt. Suppose it was a watch stolen : the owner may seize it (though he finds it in a market overt), before it is sold there. But there is no market overt for bank-notes. I deny the holder's (merely as holder) having a right to the note against the true owner ; and I deny that the possession gives a right to the note.

Upon this argument, on Friday last, LORD MANSFIELD then said that Sir Richard Lloyd had argued it so ingeniously that (though he had no doubt about the matter) it might be proper to look into the cases he had cited, in order to give a proper answer to them ; and therefore the court deferred giving their opinion to this day. But at the same time Lord Mansfield said he would not wish to have it understood in the city that the court had any doubt about the point.

LORD MANSFIELD now delivered the resolution of the court. After stating the case at large, he declared that at the trial he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case, upon the general course of business, and from the consequences to trade and commerce, which would be much incommoded by a contrary determination. It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to ; namely, to goods, or to securities, or documents for debts. Now, they are not goods, not securities, nor documents for debts, nor are so esteemed ; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are, or any other current coin, that is used in common payments, as money or cash. They pass by a will, which bequeaths all the testator's money or cash ; and are never considered as securities for money, but as

money itself. Upon Lord Ailesbury's will,¹ £900 in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. So, on bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash. 'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said "that the reason why money cannot be followed is because it has no ear-mark;" but this is not true. The true reason is upon account of the currency of it: it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but, before money has passed in currency, an action may be brought for the money itself. There was a case in 1 G. 1, at the sittings, Thomas v. Whip, before Lord Macclesfield, which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness, and being alone conveyed away the money. And Lord Macclesfield held that the action lay. Now this must be esteemed a finding at least. Apply this to the case of a bank-note. An action may lie against the finder, it is true (and it is not at all denied); but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes; for 1 Salk. 126, M. 10 W. 3, at Nisi Prius, is in point. And Lord Ch. J. Holt there says that it is "by reason of the course of trade, which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.) Here an innkeeper took it *bona fide*, in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber; for this matter was strictly inquired and examined into at the trial, and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for £1,000, it might have been suspicious; but this was a small note, for £21 10s. only, and money given in exchange for it. Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Lord Ch. J. Holt at Guildhall, in 1698, which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Lord Ch. J. Holt, in the case I have just mentioned. The action did not lie against the assignee of the bank-bill, because he had it for valuable consider-

¹ Popham *et al.* v. Bathurst *et al.*, in Chancery, 5th November, 1743.

ation. In that case, he had it from the person who found it; but the action did not lie against him, because he took it in the course of currency; and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who, *bona fide*, took it in the course of currency, and in the way of his business. The case of *Ford v. Hopkins*¹ was also cited, which was an action of trover for million lottery tickets. But this must be a very incorrect report of that case: it is impossible that it can be a true representation of what Lord Ch. J. Holt said. It represents him as speaking of bank-notes, exchequer-notes, and million lottery tickets as like to each other. Now, no two things can be more unlike to each other than a lottery ticket and a bank-note. Lottery tickets are identical and specific; specific actions lie for them. They may prove extremely unequal in value: one may be a prize, another a blank. Land is not more specific than lottery tickets are. It is there said "that the delivery of the plaintiffs' tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property: so far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note, into what hands soever it shall come." Now the whole of that case turns upon the throwing in bank-notes, as being like to lottery tickets. But Lord Ch. J. Holt could never say "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bona fide* paid to him," even though the action was brought by the true owner; because he had determined otherwise but two years before, and because bank-notes are not like lottery tickets, but money. The person who took down this case certainly misunderstood Lord Ch. J. Holt, or mistook his reasons. For this reasoning would prove (if it was true, as the reporter represents it) that, if a man paid to a goldsmith £500 in bank-notes, the goldsmith could never pay them away. A bank-note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured. There was a case in the Court of Chancery,² on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable, upon her giving bond, with two responsible sureties (as is the custom in such cases), to indemnify him against the bearer, if the notes should ever be demanded. The administratrix

¹ Hil. 12 W. 3, *coram* Holt, C. J., at Nisi Prius, at Guildhall.

² *Walmesly v. Child*, 11th December, 1749.

brought a bill, which was dismissed, because she either could not or would not give the security required. No dispute ought to be made with the bearer of a cash note, in regard to commerce, and for the sake of the credit of these notes, though it may be both reasonable and customary to stay the payment till inquiry can be made, whether the bearer of the note came by it fairly or not.

LORD MANSFIELD declared that the court were all of the same opinion for the plaintiff, and that Mr. Justice WILMOT concurred.

*Rule, that the postea be delivered to the plaintiff.*¹

PRICE v. NEAL.

IN THE KING'S BENCH, NOVEMBER 16, 1762.

[Reported in 3 Burrow, 1354.]

THIS was a special case reserved at the sittings at Guildhall after Trinity term, 1762, before Lord Mansfield.

It was an action upon the case brought by Price against Neal, wherein Price declares that the defendant Edward Neal was indebted to him in £80, for money had and received to his the plaintiff's use; and damages were laid to £100. The general issue was pleaded; and issue joined thereon.

It was proved at the trial that a bill was drawn as follows:—

“LEICESTER, 22d Nov., 1760.

“SIR,—Six weeks after date, pay Mr. Rogers Ruding, or order, £40, value received, for Mr. Thomas Ploughfor; as advised by, sir, your humble servant,

BENJAMIN SUTTON.

“To Mr. JOHN PRICE in Bush-lane, Cannon Street, London.

“Indorsed,

“R. RUDING.

ANTONY TOPHAM.

HAMMOND and LAROCHE.

“Received the contents.

JAMES WATSON & SON.

“Witness,

EDWARD NEAL.”

That this bill was indorsed to the defendant for a valuable consideration, and notice of the bill left at the plaintiff's house on the day it became due. Whereupon, the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40, and take up the said bill; which was done accordingly.

That another bill was drawn as follows:—

¹ Smith v. Union Bank, L. R. 10 Q. B. 291; 1 Q. B. D. 31; Crawford v. Royal Bank (Court of Session), Feb. 24, 1749; Swinton v. Beveridge (Court of Session), Jun? 21, 1799, accord. — ED.

“LEICESTER, 1st Feb., 1761.

“SIR,—Six weeks after date, pay Mr. Rogers Ruding, or order, £40, value received, for Mr. Thomas Ploughfor; as advised by, sir, your humble servant,
BENJAMIN SUTTON.”

To Mr. JOHN PRICE in Bush-lane, Cannon Street, London.

That this bill was indorsed R. Ruding, Thomas Watson & Son. Witness for Smith, Right, & Co. That the plaintiff accepted this bill by writing on it, “Accepted, John Price,” and that the plaintiff wrote on the back of it: “Messrs. Freame & Barclay, pray pay £40 for John Price.” That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up. Both these bills were forged by one Lee, who has been since hanged for forgery. The defendant Neal acted innocently and *bona fide*, without the least privity or suspicion of the said forgeries or of either of them, and paid the whole value of those bills. The jury found a verdict for the plaintiff, and assessed damages £80 and costs 40s., subject to the opinion of the court upon this question, “Whether the plaintiff, under the circumstances of this case, can recover back from the defendant the money he paid on the said bills, or either of them.”

Mr. Stowe, for the plaintiff, argued that he ought to recover back the money in this action, as it was paid by him by mistake only, on supposition “that these were true genuine bills;” and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at Guildhall, of *Jenys v. Fowler et al.* (an action by an indorsee of a bill of exchange brought against the acceptor), Lord Raymond would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer to swear “that they believed it not to be so;” and he even strongly inclined “that actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee.” But he urged that in the case now before the court the forgery of the bill does not rest in belief and opinion only, but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff’s case is much stronger upon the other bill, which was not accepted. It is not stated “that that bill was accepted before it was negotiated:” on the contrary, the consideration for it was paid by the defendant, before the plaintiff had seen it. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff; and, therefore, the reason upon which Lord Raymond grounds his inclination to be of opinion “that actual proof of forgery would be no excuse” will not hold here.

Mr. Yates, for the defendant, argued that the plaintiff was not entitled to recover back this money from the defendant. He denied it to be a payment by mistake, and insisted that it was rather owing to the negligence of the plaintiff, who should have inquired and satisfied himself "whether the bill was really drawn upon him by Sutton or not." Here is no fraud in the defendant, who is stated "to have acted innocently and *bona fide*, without the least privity or suspicion of the forgery, and to have paid the whole value for the bills."

LORD MANSFIELD stopped him from going on, saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be against conscience in the defendant to retain it, and great liberality is always allowed in this sort of action.

But it can never be thought unconscientious in the defendant to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of any forgery.

Here was no fraud, no wrong. It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him, and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance, the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out "that they were forged," and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

*Per Cur. Rule, that the postea be delivered to the defendant.*¹

¹ *Smith v. Mercer*, 6 Taunt. 76; *Davies v. Watson*, 2 Nev. & M. 709; *Cocks v. Masterman*, 9 B. & C. 902; *Nat. Bank v. Tappan*, 6 Kas. 456; *Bernheimer v. Marshall*, 2 Minn. 78; *Weisser v. Dennison*, 10 N. Y. 68; *Park Bank v. Ninth Bank*, 46 N. Y. 77, *accord*.

Com. Bank v. Rep. Bank, 78 Pa. 233, *contra*; and see *First Bank v. Ricker*, 71 Ill. 439; *Nat. Bank v. Bangs*, 106 Mass. 441; *Ellis v. Ohio Co.*, 4 Oh. St. 628.

Conf. Wilkinson v. Johnson, 3 B. & C. 428; *Goddard v. Merchants' Bank*, 4 Comst. 147. — ED.

PEACOCK v. RHODES.

IN THE KING'S BENCH, MAY 8, 1781.

[Reported in 2 Douglas, 633.]

IN an action upon an inland bill of exchange, which was tried before Willes, J., at the last spring assizes for Yorkshire, a verdict by consent was found for the plaintiff, subject to the opinion of the court on a special case, stating the following facts:—

“The bill was drawn at Halifax, on the 9th of August, 1780, by the defendants, upon Smith, Payne, & Smith, payable to William Ingham, or order, thirty-one days after date, for value received. It was indorsed by William Ingham, and was presented by the plaintiff for acceptance and payment; but both were refused, of which due notice was given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at Scarborough, received the bill from a man not known, who called himself William Brown, and by that name indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at Scarborough, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. William Ingham, to whom the bill was payable, indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher received it from John Daltry; and it was stolen from Joseph Fisher, at York (without any indorsement or transfer thereof by him), along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of Ingham.”

Wood, for the plaintiff, argued that the bill was taken by Peacock, in the ordinary course of business, and there was no pretence that he had notice that it had been obtained unfairly. If he had, he admitted that he could not recover. A bill indorsed by the payee is to be considered to all intents as cash, unless he chooses to restrain its currency, which he may do by a special indorsement, as, “Pay the contents to William Fisher.” *Ancher v. Bank of England*. The very object in view in making negotiable securities is that they may serve the purposes of cash. The case of *Miller v. Race*, although the question there arose upon a bank-note, establishes the principle just stated. If this bill had not been stolen, but lost, the owner might have main-

tained trover against the finder; but still the *bona fide* holder would have been entitled to recover upon it. This was determined with respect to a note upon a banker payable to A., or bearer, in the case of *Grant v. Vaughan*. Here the bill was indorsed blank; but that was the same thing, in effect, as if it had been made payable to the bearer. A blank indorsement is an indorsement to all the world; to anybody who shall happen to be the bearer. There was a case of *Francis v. Mott*, directly in point to the present, tried before Lord Mansfield, two or three years ago. There, a bill with blank indorsements had been picked out of the holder's pocket, at Manchester races. Being offered in payment to a house at Manchester, who did not know the persons whose names appeared upon it, they sent to inquire about their credit, and finding them responsible gave a valuable consideration for it, and sent it to their correspondent at London. He carried it to the drawee for acceptance, who detained it, and said it was stolen; upon which the house at Manchester brought an action against the drawer. The Attorney-General was for the defendant, and Mr. Dunning for the plaintiff. The Attorney-General attempted to show that the defendants knew the bill had been unfairly obtained, and, having failed in that proof, he gave up the cause, and the plaintiff recovered. The argument on the part of the present defendants would extend to all cases of fraud and imposition, as well as theft, and would stop the currency of bills of exchange, because it would render it necessary for every indorsee to insist upon proof of all the circumstances, and the manner in which the bill came to the indorser. As the negligence in this case was on the part of the person who lost the bill, the loss ought to fall upon him, not upon the plaintiff.

Fearnly, for the defendants. The cases on this subject are all modern; but all of them establish a distinction between bank-notes, or banker's cash notes payable to bearer, and indorsable bills or notes. The two first sorts only are considered as cash. No case that I have found is exactly in point to that before the court. In *Price v. Neale*, which was the case of a forged bill that had been accepted and paid to the defendant in the course of trade, your Lordship held that the acceptor, having given credit to it by his acceptance, should not recover back what he had paid to a *bona fide* holder; but, in the present case, there was no acceptance. *Walmsley v. Child*,¹ before Lord Hardwicke, was upon cash notes payable to bearer. Lord Holt makes the distinction between bills and cash notes in *Tassel & Lee v. Lewis*. So, in *Hodges v. Steward*, bills payable to bearer, and bills payable to order, are distinguished. Every indorsement of a bill of exchange is considered as a new bill. This was laid down by your Lordship in

¹ 1 Ves. 341.

Heylin v. Adamson; and, in Miller v. Race, a bill is considered as being only a security or document for a debt. The case of the Executors of Devallar v. Herring¹ seems exactly in point for the defendants. It is there laid down that, if the indorsee of a promissory note lose it, and the finder pay it away in the course of trade, the indorsee may maintain trover against the person to whom it has been so paid. The arguments from inconvenience are in favor of the defendants. No man is obliged to take a bill of exchange in payment. A trader should not, in prudence, take a bill, unless he know the person from whom he receives it. But, if the law were as contended for on the part of the plaintiff, the temptations to theft would be increased.

Lord Mansfield told Wood he need not reply, and delivered the opinion of the court, as follows:—

LORD MANSFIELD. I am glad this question was saved, not for any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps, in the single case (which is a hard one, but has been determined) of a note for money won at play. Lowe v. Waller. I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of *mala fides* was for the consideration of the jury. The circumstances that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them, and have found it was received in the course of trade; and, therefore, the case is clear, and within the principle of all those Mr. Wood has cited, from that of Miller v. Race downwards, to that determined by me at *nisi prius*.

*The postea to be delivered to the plaintiff.*²

¹ 9 Mod. 44, 47.

² Lambton v. Marshall (Court of Session), June 21, 1799; Scott v. Kilmarnock Co. (Court of Session), Feb. 27, 1812, *accord.* — Ed.

LOWE AND OTHERS v. WALLER.

IN THE KING'S BENCH, JUNE 26, 1781.

[Reported in 2 Douglas, 736.]

THIS was an action on a bill of exchange, tried before Lord Mansfield, at Guildhall, at the sittings after last Hilary term.¹ The plaintiffs declared as indorsees of Harris & Stratton, to whom the bill was stated to have been indorsed by Lawton, the drawer and payee. The defendant was the acceptor. The defence was that the bill was given upon an usurious contract between Harris & Stratton and the defendant.² This was controverted by the plaintiffs; but they also insisted that the bill was indorsed to them for a valuable consideration, and without notice of the supposed usury; and it was argued that, although it should appear that the original transaction was usurious, still the defendant was answerable to them.

This question was argued, on the case reserved in this present term, on Tuesday, the 19th of June, by *Morgan* for the plaintiffs, and *Davenport* for the defendant.

In the case of *Bowyer v. Bampton*, it was determined that, upon the construction of the statute of 9 Anne, c. 14, § 1, a promissory note given for money knowingly lent to game with is void in the hands of an indorsee for valuable consideration, and without notice; for the words of that statute being, "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, &c., where the whole or any part of the consideration shall be, &c., shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever," the court held that it would be making the note of some use to the lender, if he could pay his own debts with it; and that the indorsee would not be without remedy, for he might sue the indorser on his indorsement.

This case having been much relied on by the counsel for the defendant, when they argued the present point, upon the motion for a new trial,—because, as they insisted, the words of 12 Anne, st. 2, c. 16, though not exactly the same, are equally strong with those just cited from the act against gaming,—it was now contended on the part of the plaintiffs:

¹ The action was directed by an order of the Court of Chancery, dated the 18th of December, 1780.

² The court were clearly of opinion that the transaction between Harris & Stratton and the defendant was usurious. The arguments and opinions upon this point of the case have been omitted. — ED.

1. That the two acts differed essentially as to the present question, and that, both before and since the statute of 12 Anne, usury was no bar against third persons not affected with notice; 2. That the case was contrary to other decisions, and not law. 1. Notes and bills are expressly mentioned in the act of 9 Anne, and are omitted in the other. Such a difference in two statutes, which passed so recently the one after the other, must have been intentional; and this being a question on a penal law, the court will construe it with the utmost strictness. It may indeed be said that a bill comes under the word "assurance," used in 12 Anne; but it is fair to infer that, as the word "bill" itself was (and as it seems purposely) omitted, the legislature could not mean to include the thing under a general term, and which, in common acceptation, is not extended to bills and notes; they being rather considered as cash than as assurances for the payment of money. In all the prior acts against usury, from the reign of Queen Elizabeth, 13 Eliz. c. 8, § 3, 21 Jac. I. c. 17, § 2, and 12 Car. II. c. 13, § 2, as well as in 12 Anne, st. 2, c. 16, the words "bonds, contracts, and assurances," are used; and yet there is not a case in the books, from the 13th of Elizabeth till this day, in which it has been determined that the innocent holder of a bill of exchange shall be precluded, on account of usury in the original transaction, from recovering against the acceptor. Nay, it was expressly and solemnly decided, even in the case of a bond (*viz.* in *Ellis v. Warnes*,¹ which was long after the statute of Elizabeth), that, "where W. was indebted in £100 to A. upon an usurious contract on a bond, and A. being indebted to E. transferred the debt to E., and W. became bound for the same usurious debt to E. whose debt was just, and he ignorant of the usury, the obligation made by W. to E. was not avoidable for the usurious contract made between W. and A." Therefore, though bills should be considered as within the meaning of assurances, still the intention cannot have been to make them void in the hands of persons ignorant of the usury. Indeed, it should seem, by the very words of all the acts, that the provision in question was only meant to be applied to securities where an usurious consideration appears on the face of the instrument: in all of them, the expression is, "whereupon, or whereby, there shall be reserved or taken more than," &c. 2. As to the authority of the case of *Bowyer v. Bampton*, it is directly contrary to the doctrine laid down by Lord Holt, in *Hussey v. Jacob*,² and which is stated by him as founded on previous determinations. "A. (says he) wins money of B., and, for a debt which A. owes C., he appoints B. to give C. a bond: it is good, because C. is an innocent person, and it will be the same thing if A. is bound with him;" or, as it is expressed in

¹ Moore, 752; Cro. Jac. 32; Yelv. 47.² 1 Salk. 344; Com. 4.

the report of the same case by Comyns, "If a bill is given for money won at play to the winner, or order, and the winner indorses it to a stranger for a just debt, and the person upon whom the bill was drawn accepts it in the hands of the stranger, the acceptor will be liable."¹ Comyns, in his Digest, cites this case of *Hussey v. Jacob*, and adopts the position of Lord Holt as law.² A contrary decision would be highly inconvenient to trade. Bills circulate like money, but if it become necessary for every man to inquire into the original consideration before he can take one with safety, their currency will entirely cease. Morgan also cited *Robinson v. Bland*³ and *Rex v. Sewell*.⁴

The arguments on the other side were: that the word "assurances" comprehends bills as much as any other sort of security; and to hold that an innocent indorsee could make use of a bill given on an usurious contract would be against the obvious meaning of the words "utterly void," in the statute of 12 Anne. Wherever the acts against gaming and those against usury differ, it will be found that the provisions against usury are the strongest. Thus, though the statute of 9 Anne, makes all securities given for money won at play or lent to play with void, it does not declare that the contract itself shall be void; and the prior act of 16 Car. II. c. 7, which says that contracts, and all securities for money lost⁵ at play, shall be utterly void, does not extend to money lent to play with. Therefore, in the case of *Barjeu v. Walmsley*,⁶ it was held that an action would lie on the contract for money knowingly lent to play with; and, in *Robinson v. Bland*,⁷ the same distinction was made. But by 12 Anne, st. 2, c. 16, not only the security or assurance, but the contract itself, is made void. This shows that the legislature was still more anxious to prevent usury than gaming. Now, as to gaming, the case of *Bowyer v. Bampton* is a direct and solemn authority. The decision was after two arguments; and Lee, C. J., observed that what Lord Holt had said in *Hussey v. Jacob* was extra-judicial, and that he had seen a report wherein notice was taken, that all the learned part of the bar wondered at it. Indeed, by the report of the case in *Carthew*,⁸ the court is only made to say "that, if the bill had been negotiated and indorsed to any other person for value received, then it might have been another consideration." It must be admitted that the bill, in the present case, was void at first. Now, how can a thing void in its origin be rendered valid by any thing done to it afterwards? If it were to be held that it should appear on the face of the instrument that more than 5 per cent is to be paid, the statute would become almost a dead

¹ Com. 6.² 5 Com. Dig. 610.³ 2 Burr. 1077.⁴ 7 Mod. 118.⁵ To the amount of more than £100 at any one time or meeting.⁶ 2 Stra. 1249.⁷ 2 Burr. 1077.⁸ Carth. 355.

letter; for what usurer is so unskilful in his trade as to suffer the usury to appear on the face of the security? And how easy will it be for the lender to pay away bills on which he himself could not recover, either *bona fide*, to persons to whom he is indebted, or colorably, to some secret partner in the business, but whose knowledge of the usury cannot be traced? It is said it will be dangerous to trade, if third persons cannot recover. But this supposes that usurious contracts are very universal; and, if they are, it is highly proper they should receive a check of this sort. Besides, what greater risk will there be than is run every day, when notes or bills are taken from women who may be under coverture, or from young persons who may be minors, unknown to the persons taking such notes or bills? If Harris & Stratton are solvent, the plaintiffs will not suffer; and it is the business of indorsees to satisfy themselves with respect to the solvency of the indorser. In the case of *Ellis v. Warnes*, there was an immediate security given to the third person; and so indeed it is supposed to be, in the case put by Lord Holt in *Hussey v. Jacob*, as reported by Salkeld.¹

The court took till this day to consider; and now Lord Mansfield delivered their opinion to the following effect:—

LORD MANSFIELD. We have considered this case very attentively, and I own with a great leaning and wish on my part that the law should turn out to be in favor of the plaintiffs. But the words of the act are too strong. Besides, we cannot get over the case on the statute against gaming, which stands on the same ground. This is one of those instances in which private must give way to public convenience. It is less mischievous that the law should be as it is with respect to bills and notes than other securities; because they are generally payable in a short time, so that the indorsee has an early opportunity of recurring to the indorser, if he cannot recover upon the bill.

*The postea to be delivered to the defendant.*²

¹ Salk. 344.

² *Young v. Wright*, 1 Camp. 139; *Ackland v. Pearce*, 2 Camp. 509; *Jones v. Davison*, Holt, 256 (*semble*); *Bacon v. Lee*, 4 Iowa, 490; *Sauerwein v. Brunner*, 1 Har. & G. 477; *Kendall v. Robertson*, 12 Cush. 156; *Knapp v. Briggs*, 2 All. 551; *Jones v. Hake*, 2 Johns. Cas. 60; *Wilkie v. Roosevelt*, 3 Johns. Cas. 66, 206; *Bell v. Wood*, 1 Bay, 249 (*semble*); *Harick v. Jones*, 4 McC. 402; *Tait v. Hannum*, 2 Yerg. 350; *Taylor v. Beck*, 3 Rand. 316, *accord*.

For other instances of notes declared absolutely void by statute, and therefore invalid, even in the hands of an innocent holder for value, see *Weed v. Bond*, 21 Ga. 195; *Easter v. Minard*, 26 Ill. 494; *Taylor v. Atchison*, 51 Ill. 196; *Puffer v. Smith*, 57 Ill. 527; *Richardson v. Schirtz*, 59 Ill. 313; *Munson v. Nichols*, 62 Ill. 111; *Sims v. Bice*, 67 Ill. 88; *Hewitt v. Jones*, 72 Ill. 218; *Hubbard v. Rankin*, 71 Ill. 129; *Hewett v. Johnson*, 72 Ill. 513; *Wilson v. Miller*, 72 Ill. 616; *Parkinson v. Finch*, 45 Ind. 122; *First Nat. Bank v. Grindstaff*, 45 Ind. 158; *Bayley v. Taber*, 5 Mass. 286; *Wiggin v. Bush*, 12 Johns. 306; *Streit v. Sanborn*, 47 Vt. 702. — ED.

GREY v. COOPER.

IN THE KING'S BENCH, APRIL 19, 1782.

[Reported in 3 Douglas, 65.]

THIS was an action on a bill of exchange, by the indorsee against the drawer. The declaration stated that the defendant drew the bill payable to one Walker, who indorsed it to Holbrook, who indorsed it to Shipden, who indorsed it to the plaintiff. Pleas: 1. *Non assumpsit*; 2. That Walker, at the time of the indorsement by him, was an infant. Demurrer to the second plea.

Morgan, for the defendant, was desired by the court to begin. It is stated that the infant was a person using trade and commerce; but, admitting that allegation to be mere form, the infancy is a good plea, as duress or insanity would be. It ought, at least, to be shown that the infant was benefited by the indorsement, as that he received a valuable consideration for it. *Thompson v. Leach*,¹ *Lloyde v. Gregory*; ² Br. Ab. tit. Coverture, 40; Roll, Ab. tit. Coverture, 728.

Davenport, for the plaintiff. Perhaps this action might not be maintained against the infant himself; but the answer to the present objection is that a man having made a negotiable instrument shall not refuse to pay it to the person to whom it was given, or to the person to whom the payee was authorized by him to indorse it. A valuable consideration for the indorsement must be presumed; and, as to the objection that the infant is not a trader, the defendant is estopped, by his having drawn the bill payable to the infant, from making that objection.

LORD MANSFIELD. The ground on which the drawer is charged is that he drew a bill by which he engaged to pay according to the order of the payee, whoever that payee might be. He might give the infant an authority which the law itself does not give him. In the same manner, he may give a bill to his own wife. The drawer says, "Let anybody trust the payee on my credit." The acts of an infant are void or not, accordingly as they are for his benefit. The privilege of an infant is personal, and there is no question here as between the infant and another person. The infant sets up no claim, and the drawer is liable to pay.

*Judgment for the plaintiff.*³

¹ B. R., T. 2 W. & M. 3 Mod. 301.

² B. R., T. 14 Car. 1 Cro. Car. 502.

³ *Taylor v. Croker*, 4 Esp. 187; *Jones v. Darch*, 4 Price, 300; *Hastings v. Dollard*, 24 Cal. 195; *Frasier v. Massey*, 14 Ind. 382; *Hardy v. Waters*, 38 Me. 450; *Nightingale v. Withington*, 15 Mass. 272; *Burke v. Allen*, 29 N. H. 106 (*semble*), *accord.* — Ed.

SMITH v. CHESTER.

IN THE KING'S BENCH, APRIL 28, 1787.

[Reported in 1 Term Reports, 654.]

INDORSEE of a bill of exchange against the acceptor. It appeared at the trial, before Buller, J., at the last sittings at Westminster, that when the bill was accepted there were several indorsements on it. But the plaintiff, not being able to prove the handwriting of the first indorser, was nonsuited.

Bower now moved to set aside this nonsuit, on the ground that, as these indorsements were on the bill at the time of the acceptance, they must be taken to have been admitted by the drawee, and he could not afterwards dispute them; and he cited, in support of this, a determination of Lord Mansfield's in the case of *Pratt v. Howison*, at the sittings after Trinity term, 23 G. 3, at Guildhall, and another case in *Sayer*, 223, observing that there would be great hardship in the case of foreign bills of exchange in many instances, on account of the difficulty and inconvenience of proving the handwriting of the first indorser, who may be unknown to the holder.

ASHHURST, J. The law has been otherwise settled. And, if it were not so, there would be no difference in this respect between bills payable to order and those payable to bearer. And it would open a door to great fraud.

BULLER, J. This point was much considered in a late case before this court, when they were perfectly clear that an indorsee of a bill of exchange, in an action against the acceptor, was obliged to prove the handwriting of the first indorser. For when a bill is presented for acceptance, the acceptor only looks to the handwriting of the drawer, which he is afterwards precluded from disputing; and it is on that account that an acceptor is liable, even though the bill be forged.

GROSE, J. This matter appears extremely clear; for a bill of exchange is no payment to the person in whose favor it is drawn, unless it is indorsed by him.

*Rule refused.*¹

¹ *Hammond v. Freeman*, 9 Ark. 62; *Blum v. Sallis*, 24 La. An. 118; *Dana v. Underwood*, 19 Pick. 99; *Rogers v. Ware*, 2 Neb. 29, *accord*.

Hankey v. Wilson, *Sayer*, 223; *Stone v. Freeland*, 1 H. Bl. 316, n. (a), (but see 3 T. R. 176, s. c.); *Jones v. Radford*, 1 Camp. 82, n., *contra*.

See *Waynam v. Bend*, 1 Camp. 175. — ED.

MINET AND ANOTHER v. GIBSON AND ANOTHER.

IN THE KING'S BENCH, NOVEMBER 24, 1789.

[Reported in 3 Term Reports, 481]

THIS was an action on a bill of exchange; and the first count in the declaration stated that Livesey & Co., on the 18th February, 1788, made a bill of exchange, directed to the defendants, requiring them three months after date to pay £721 5s. to John White, or order; Livesey & Co. well knowing that no such person as J. White existed; on which bill an indorsement was made, purporting to be the indorsement of J. White named in the bill, requiring the contents to be paid to Livesey & Co., or order; that Livesey & Co. (by one Absalom Goodrich, by procuration of Livesey & Co.) indorsed to the plaintiff, and that the defendants accepted it, knowing that no such person as J. White existed, and that the name of J. White so indorsed was not the handwriting of any person by that name.

The second count, after stating the drawing of the bill, as above, proceeded thus: Livesey & Co., knowing that J. White was not a person dealing with or known to Livesey & Co., and using the name of J. White in the bill as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually indorsed by him; upon which bill a certain indorsement was made, requiring the payment to be made to Livesey & Co., and that Livesey & Co. indorsed to the plaintiffs, without having delivered the bill to J. White, and without any actual indorsement or assignment of the bill by White.

The third count stated that the bill was made payable to themselves, Livesey & Co., by the name and description of J. White.

The fourth treated it as a common bill payable to J. White, or order, and that J. White indorsed it to the plaintiffs.

The fifth as payable to bearer; and that the plaintiffs were the bearers.

The sixth payable to J. White, or order, with an averment that, when the bill was made, there was no such person as J. White, the supposed payee; but that the name was merely fictitious, by reason whereof the sum mentioned in the bill became and was payable to the bearer thereof, according to the effect and meaning of the bill; averring also that the plaintiffs were the bearers and proprietors thereof.

The seventh count stated that there was a partnership, or house, of certain persons using trade as well in the name and firm of Livesey &

Co. as in the name and firm of J. White ; that the last-mentioned persons made a certain other bill (the hand of one of them on their joint account, and in their copartnership name and firm of Livesey & Co. being thereto subscribed), and directed it to the defendants, requiring them three months after date to pay to the said last-mentioned copartners, by the name of J. White, or order, £721 5s.; and that the said last-mentioned copartners afterwards by a certain indorsement in writing appointed the contents to be paid to the plaintiffs, and delivered the bill so indorsed to them.

There were also other counts for money had and received by the defendants to the use of the plaintiffs : for money paid, laid out, and expended by the plaintiffs to the use of the defendants, and for money lent and advanced by the plaintiffs to the defendants. The defendants pleaded the general issue.

A special verdict was found,¹ stating (in substance) that Livesey & Co. made a certain instrument in writing, directed to the defendants, requiring them, three months after date, to pay to John White, or order, £721 5s.; that Livesey & Co., at the time of making it, well knew that no such person as J. White, in the bill mentioned, existed ; that a certain indorsement in writing was afterwards made by Livesey and Co., purporting to be the indorsement of J. White, and requiring the contents of the bill to be paid to Livesey & Co., or their order ; that Livesey & Co. afterwards indorsed (by A. Goodrich, by procuration of Livesey & Co.) to the plaintiffs for a full and valuable consideration, when the plaintiffs became and still are the holders of the bill ; that the defendants afterwards accepted, well knowing that no such person as J. White, in the bill named, existed, and that the name of J. White so indorsed thereon was not the handwriting of any person of that name ; that the defendants at the time of the making and accepting the bill had not, nor had they at any time since, any money, goods, or effects, whatsoever of or belonging to Livesey & Co. or of the plaintiffs, in their hands ; and that the defendants have not paid the bill (although often requested). But whether upon the whole matter the defendants are liable, &c., the jurors are ignorant, and pray the advice of the court, &c.

This verdict was set down in this day's paper for argument ; but

THE COURT, being of opinion that this case was decided by that of

¹ This question first came before the court on a motion for a new trial ; but, as it was of so much importance, bills to the value of near a million a year having passed through these houses only, the court recommended it to the parties to consent to have a special verdict, in order that the record might be carried to the House of Lords ; and the counsel for both parties, without going to another trial, agreed upon stating this verdict.

Vere v. Lewis, 3 T. R. 181, gave judgment for the plaintiffs without hearing any argument; adding that they understood that the reason why it was agreed to be turned into the shape of a special verdict was that it might be carried up to the *dernier ressort*.

*Judgment for plaintiffs.*¹

¹ From the report of this case in the House of Lords in 1 H. Bl. 569, 580, it appears that judgment was given for the plaintiffs upon the fifth count, and for the defendants upon the other counts. The judgment of the King's Bench was affirmed in the House of Lords, 2 H. Bl. 569-625. In answer to questions put to the judges, Hotham, B., Perryn, B., Thompson, B., and Gould, J., delivered opinions that the matter of the special verdict would sustain the fifth count, and also the first count. Eyre, C. B., and Heath, J., were of opinion that the plaintiff was not entitled to judgment on any of the counts. Lords Kenyon, Loughborough, and Bathurst were for affirming the judgment below, while Lord Thurlow coincided with the minority of the judges. The full report of this case in the House of Lords is too voluminous for insertion in this collection of cases, but the dissenting opinion of Lord Chief Baron Eyre, whose reasoning, it is conceived, has never been refuted, is so conspicuous for its statement of the essential characteristics of negotiable paper that the following extracts from his opinion are here given:—

“I shall make a few introductory observations, which I apprehend will apply to all these counts. And first I observe that the questions which arise upon this record are questions which relate to the plaintiffs' declaration, and not to the defendants' plea; to the plaintiffs' title to sue, and not to the defence set up against that title. I presume it must be admitted to me that a plaintiff who sues upon a bill of exchange must show a title to sue upon it, in the same manner as every other plaintiff must show a sufficient title to enable him to maintain the action which he brings. Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee or from the drawer, in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee. The title of an original payee is immediate, and apparent on the face of the bill. The derivative title is a title by assignment, a title which the common law does not acknowledge, but which exists only by the custom of merchants. As it is by force of the custom of merchants that a bill of exchange is assignable at all, of necessity the custom must direct how it shall be assigned; and, in respect of bills payable to order, the custom has directed that the assignment should be made by a writing on the bill called an indorsement, appointing the contents of that bill to be paid to some third person; and, in respect of bills drawn payable to bearer, that the assignment should be constituted by delivery only. This is simple and obvious: every man who can read can discover whether the holder of a bill claims to be the assignee of it as indorsee or as bearer. If it should be questioned whether a bill payable to bearer passes by assignment, or whether every bearer is not an original payee, as being within the description in the bill itself of the original payee, it does not appear to me to be necessary to this argument that this question should be decided. I am content that it should be taken either way. In either case, the title of a bearer is self-evident, the title of an indorsee appears by the indorsement itself, the truth of which is guaranteed by the highest penal sanctions. Every thing which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty, and creates a debt or duty by its own proper

force, whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom, appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise any thing better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning it, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple instrument demands that the simplicity of it should be protected, and that it never should be entangled in the infinitely complicated transactions of particular individuals into whose hands it may happen to come. Hitherto that policy has prevailed. We shall all agree that, if a man claims to be entitled to a bill of exchange drawn payable to a real payee or order, and has not an indorsement by the payee, he cannot count upon it as upon a bill of exchange, though he should have paid to that payee the full value of it, and though it were bargained, sold, assigned, and conveyed to him, by every form of conveyance which courts of law and equity in this country have recognized. The policy has lately prevailed so authoritatively that two juries, under the direction of a noble and learned judge, have established, as far as their verdict could establish, a title by indorsement from one of the name of the payee, who was not the real payee in whose favor the bill was drawn, but into the hands of whom the bill fell by some accident or negligence in the drawer. *Mead v. Young*. Possibly as names are but designations of persons, and that bill was in fact not made payable to that person, these verdicts may not be acquiesced in, and the question as to that indorsement may be considered as not finally settled. While I am speaking, I hear from authority that the question is not finally settled, for that the last verdict, which I had understood to be general, is a special verdict; but the very question is an illustration of the proposition that a bill of exchange is what it imports to be upon the face of it. The plaintiffs in this cause have taken upon themselves to count, in that part of their declaration which I am now examining, upon a bill of exchange, and to state a title to that bill by assignment. In their fourth count, they state a strict title to it by indorsement from John White, the nominal payee. The special verdict has found the writing upon which the question arises to be an instrument in writing purporting to be a bill of exchange, drawn payable to John White or order; but the special verdict has directly negatived the supposed indorsement by John White, and I think we all agree that upon the fact the plaintiffs have failed to make out that title. If my introductory observations are well founded, it should seem that the plaintiffs can make no other title to a bill of exchange so constituted. At the common law, it was not assignable at all: it is assignable by the custom of merchants only; and the custom of merchants directs that the assignment should be by indorsement from the person to whom it is drawn payable; and I have supposed it to be agreed that, if the payee were a real person, it could by no possibility be transferred in any other manner. But the plaintiffs have stated a title of a different kind in their first and second counts, adapted to the truth of the case as it stands established by this special verdict. They agree that this bill was drawn payable to John White or order, but they say the name John White is a fictitious name, and his indorsement consequently fictitious; that this was known to the acceptors when they accepted; that they, the plaintiffs, received the bill from the drawer, with his indorsement upon it, by procuration; and by reason of all this they insist that, though they have no indorsement from John White, yet that, according to the usage and custom of merchants, the acceptors became liable to pay the value of the bill to them.

Where the traces are to be found of the usage and custom of merchants applying to such a case, I have not yet discovered. This conclusion is a conclusion of the law-merchant, or it is nothing. How is it to be deduced? Surely, no logician would draw such a conclusion from such premises so stated. If it be the arbitrary rule of positive law governing a case so stated, I ask, Where is that rule to be found? If no such rule is to be found expressly laid down in the law-merchant, is it to be collected by inference from any of the known rules of that law? Is it not a monstrous absurdity to suppose that the usage and custom of merchants can have any thing to do with a case, which, upon the bare state of it, is only fit for the Old Bailey to give the rule upon? What is the proposition of the plaintiffs, reduced to the fewest words possible? 'We are not the assignees of this bill of exchange by the indorsement of the payee: it is impossible we should be, because in truth there was no payee in existence; therefore, according to the usage and custom of merchants, we are entitled.' Whereas, the conclusion which the custom makes must be, 'Therefore you are not entitled.' The common law must say the same thing. It must say, 'It is only by force of the custom of merchants that this chose in action can be claimed by an assignee: you have not made yourselves assignees according to the custom of merchants, therefore the common law cannot recognize your title.' These plaintiffs, instead of showing themselves assignees according to the custom, have confessed that they are not such assignees, and in doing this they have furnished another argument against their title, to which I could never find an answer, namely, that this supposed bill of exchange was in its original conception a mere nullity, a piece of waste paper, upon which the custom of merchants never attached, in which no man ever had an interest, and in which, consequently, no interest could be transferred under any pretence of indorsement by anybody, or by delivery of possession, or in any other manner whatsoever. This argument may require a little more examination and discussion. I will go by steps. If I put in writing these words, 'I promise to pay £500 on demand, value received,' without saying to whom, it is waste paper. If I direct another to pay £500 at some day after date for value received, and not say to whom, it is waste paper. Will it mend the matter if I say, 'I promise to pay £500,' or if I direct another 'to pay £500 to the pump at Aldgate'? I use that vulgar expression because it has been used, and because it forcibly expresses the idea I wish to convey; what is a fictitious payee but the pump at Aldgate? If I add, 'or order,' what difference does it make? If I add, 'or bearer,' there is a very sensible difference. There may be a bearer, but in the nature of things there can be no order. The bill, therefore, cannot be transmitted by order: the fictitious payee can no more order than the pump at Aldgate can order. Such a bill then is a mere nullity in its original conception, and must ever remain a mere nullity. It is impossible ever to animate it, or give it motion or transmissibility. The drawers of this declaration saw these difficulties in the title of the plaintiffs, claiming to sue on a bill of exchange payable to John White, a fictitious payee or order; and therefore in the fifth and sixth counts they made a bold attempt to manufacture the bill anew. But they seem not to have made the best use of their materials. If they had declared upon a bill drawn by Livesey & Co. (the indorsers by procuration), payable to the plaintiffs or their order, they might have alleged that our books say that every indorsement is a new bill; and, if that be so, this bill is a new bill, wherein the indorsers are drawers and the indorseees the payees. But they have not chosen to take this ground. In the fifth count, they say simply that the bill was drawn payable to bearer; in the sixth, they say that the bill was drawn payable to Mr. John White or order, but that the payee was fictitious, and therefore the contents of the bill became payable to bearer, according to the effect and meaning of it. This last statement has the merit, at least, of being very

distinct; and though it determines the construction of the bill by a fact *dehors* the bill (for it cannot appear on the face of the bill itself that the payee is fictitious), it is a fact existing at the moment when the bill was fabricated; whereas, in arguing the special verdict as applied to the fifth count, to show that this bill, though purporting to be drawn payable to order, was in the eye of the law-merchant a bill payable to bearer, it becomes a very complex case. The subsequent indorsement in the name of John White, the indorsement by procuration from Livesey, Hargreave, & Co., and the acceptors' knowledge of the circumstances, are all called in to assist in the demonstration that this is a bill payable to bearer. With the drawers of this declaration I am at issue, with respect to the sixth count, upon a very short point. They say that a bill drawn to a fictitious payee is a bill payable to bearer, according to the effect and meaning of it: I say that such a bill is a mere nullity. To my apprehension, it is not a very sound argument that it must be payable to bearer because it cannot be payable in any other manner. I observe that it is not even stated in the sixth count that by reason of the payee being fictitious the bill became payable to bearer, according to the usage and custom of merchants; but the words 'according to the effect and meaning of the bill' are substituted in the room of those other words. Upon what authority was it said that such was the effect and meaning of this bill? It is directly contrary to the purport of it. If the intention of the drawers, the acceptors, or the plaintiffs themselves, will assist us to find out the intent, which the purport of the bill is to be supposed not to have sufficiently conveyed, they all consider this bill as a bill not payable to bearer, but as a bill to pass by indorsement in strict conformity to its purport; and there are in fact indorsements upon it. Where then is the authority for the averment, that it was according to the effect and meaning of this bill that the contents should become payable to bearer. Is there any better proof of this averment than it must be so, because it could not be payable to order?

"Thus far I have considered this bill simply as a bill drawn to a fictitious person or order, without more, with a view to the allegations in the sixth count. If we go a step further, we get into the particular circumstances stated in the special verdict, and the general proposition in the sixth count is then abandoned. I am now to enter upon a discussion of those circumstances. In examining the argument upon the particular circumstances of the case of these plaintiffs, as stated in the special verdict, with a view to the application of them to any of the counts, and particularly to the fifth count, to which they have been supposed capable of being applied, I confess I have great difficulties to encounter. Transactions are stated which arose subsequent to the making of the bill: how they can affect the construction of the instrument at all, what the chain of reasoning is, how they conclude to make a bill drawn payable to John White, or order, a bill payable to bearer rather than a bond, I confess myself absolutely at a loss to comprehend. The sixth count supposes this metamorphosis to have been the immediate effect of the payee being fictitious; then this was a bill payable to bearer before the delivery of it to the plaintiffs, before the acceptance and before the false indorsement in the name of John White, and the real indorsement of the drawers by procuration; then an honest acceptor, who did not know the fact of the payee being fictitious, became bound to pay this bill to any man who brought it, without an indorsement. Is an honest acceptor to be put into that predicament? When he requires an indorsement as the title of the holder to demand payment of him, agreeable to the purport of the bill, is he to be answered with an action and a recovery against him by the bearer, upon proof made at the trial of a fact (of which he knew nothing) that the payee was fictitious, by reason whereof, according to the effect and meaning of the bill, the contents became payable to the bearer? This surely is too strong to be insisted upon. The sixth count

must therefore be abandoned, and the knowledge of the acceptor must be taken in aid, to eke out this extraordinary proposition. The fact, as it is stated in the special verdict, is that the acceptors at the time of their acceptance knew that the payee was fictitious. The argument which is built upon this fact, if I understand it, is *argumentum ad hominem*, that he shall never be permitted to defend himself by alleging that the payee was fictitious, and therefore that the plaintiffs have no title. The argument is pushed one step further: it is said, as against him it shall be a bill payable to bearer. We have legal principles which govern the *argumentum ad hominem*; as far as they will lead me, I am content to follow them; but I dare not go further. I am ready to admit that, beyond the strict legal estoppels by deed and *in pais*, we have received into the law of England a sort of moral estoppel. We say, no man shall be heard to allege his own crime or turpitude in his defence. And in that sense I agree that no man shall take advantage of his own fraud, and he shall not set up his own fraud by way of defence.

“But a plaintiff must always recover upon his own strength. He must state and he must prove a case, which is *prima facie* sufficient. When that is done, a defendant shall not set up his own fraud, by way of answer and defence. As against him, the plaintiff's case, though defective, if the whole truth could come out, shall prevail. That this is the rule of law which governs legal estoppels will appear by a reference to two cases reported by Lord Raymond: *Hermitage v. Jenkins*, 1 Lord Raym. 729; *Palmer v. Ekins*, 2 Lord Raym. 1550. In the last, Lord Raymond says, in giving the judgment of the court, ‘There, upon the very face of the declaration, it appeared to the court that the lease from the defendant was only a lease by estoppel, and nothing of an interest could pass thereby, and consequently nothing could pass by the assignment to the plaintiff; but here, upon the face of this declaration, a good title appears in the plaintiff, and that being so, the declaration itself is good, and the defendant by her plea pleads a fact, which by her indenture she is estopped from pleading, which makes the plea ill.’ As to the moral estoppel, I will cite the concluding words of a judgment (3 T. R. 403), pronounced against a plaintiff by a noble and learned judge in the name of the whole Court of King's Bench: ‘The defence which is made is of a most unrighteous and unconscientious nature; but, unfortunately for the plaintiff, the mode which she has taken to enforce her demand cannot be supported, and consequently there must be judgment for the defendant.’ The noble and learned Lord was perfectly correct, when he delivered this opinion. Where the plaintiff himself cannot show a *prima facie* case, the defendant is not driven to plead any thing: he demands the judgment of the court upon the plaintiff's own case. A defendant may be estopped to plead, but was it ever seen in our law that a defendant was estopped to demur? As to some of the counts in this declaration, and among them the sixth, we are in effect now arguing a demurrer to the declaration. With respect to such of the counts as are to be maintained by the facts in the special verdict, and among them the fifth, I agree with Mr. Justice Heath that those facts, which in the shape of allegation or averment upon record would make a count ill upon demurrer, must have the same effect in evidence when proved; and it is to be observed that the facts which destroy the plaintiffs' title to put this bill in suit, this leading fact in particular, ‘that the payee was fictitious,’ are found by a jury, and a jury are never estopped to find the truth of a matter *in pais*, even in cases where a defendant would be estopped to plead it.

The argument in favor of the plaintiffs, founded upon the knowledge of the acceptors, divides itself into two branches: 1st, The defendants shall not set up the fictitious payee by way of defence (which I agree to be a fair argument, and only dispute the application of it); 2dly, That, as against them, the bill shall be taken as a bill payable to bearer. This I controvert: I say, unless it can be proved that it is

a bill payable to bearer against all the world, it never can be shown to be a bill payable to bearer against them. Let the defendants' knowledge evidence every thing it can evidence, infer from it every thing you can infer: you cannot infer from it, nor will it evidence, that the bill is a bond. No more can you infer, no more will it evidence, that a bill payable to order is a bill payable to bearer. This is absolutely turning one thing into another, instead of making reasonable intendments and inferences from premises which fairly warrant them. It is also to be observed that we are not now directing juries what inferences of fact they ought to make from the facts in evidence before them, where there will be a certain latitude which an honest indignation, in a case of great fraud, may sometimes enlarge to its utmost verge. But we are applying rules of law to a precise state of facts in a special verdict, where no latitude at all can be admitted. I said that the first branch of this argument was inapplicable. The defect in the plaintiffs' title arises upon their own showing in the declaration, and in evidence. Having no title, they are obliged to state, in the place of title, that the defendant has been party to a fraud on them, by which they have been robbed of their title. Every court of justice may and ought to say this is a wrong, for which there ought to be redress. But what court can say that by reason of such premises the plaintiff is not robbed of his title, but has a title; or, if they are obliged to admit that he is robbed of the title for which he bargained, can say, 'True, but we will make another for him'? This is what is here insisted on, and this is what I cannot comprehend. I trust that I have a proper detestation of fraud, but I conceive that it would be much better to punish fraud, when we meet with it, in the direct way, either criminally or by the action *ex delicto*, than to refine too much in order to correct it, at the hazard of shaking general rules and disturbing landmarks. This is a sort of countermining which I think a very delicate and a very dangerous operation. I have not forgot that an argument has been drawn from a supposed analogy between bills of exchange and deeds, to prove that a court of justice ought to new-mould a bill of exchange, and construe a bill drawn payable to order, to be a bill payable to bearer, *ut res magis valeat quam pereat*. I discover no analogy between deeds and bills of exchange. Deeds are at the common law, they have their operation and their construction by the rules of the common law, they are contracts of a more solemn nature than other contracts; between particular parties, respecting particular interests, in particular subjects. Bills of exchange are instruments taking effect by the custom of merchants, intended to circulate visible property according to their apparent purport, entirely detached from and independent of all particular interests, particular subjects, and the private transactions between the original parties to the instrument. And I think I may fairly argue, from the different nature of the instruments, that upon the very same general principles which have disposed the common law of England to mould deeds by construction, so as to effectuate the intent of the parties, *ut res magis valeat quam pereat*, the law-merchant must restrict bills of exchange to the precise mode of negotiation determined by the language of the bills themselves, without regard to any thing *dehors*. But let it be supposed, for the sake of the argument, that there may be some analogy between deeds and bills of exchange: I ask, What are the instances in which construction and interpretation have taken so great a liberty with deeds as to afford an argument by analogy, for construing in this case a bill drawn payable to order to be a bill drawn payable to bearer? The instances which had occurred to me as likely to be insisted upon do, in my apprehension, afford no argument in support of this position. A deed of feoffment upon consideration without livery may enure as a covenant to stand seised to the use of the intended feoffee. A deed importing to be a grant by two, one having a present, the other a future interest, may enure as the grant of the former and the confirmation of the latter. A feoffment

without livery operates nothing as a feoffment, is in truth no feoffment, but is a deed, which under circumstances may operate as a covenant to stand seised to uses. Why? The feoffor has by the deed agreed to transfer the seisin and his right in the subject to the feoffee. If the consideration is a money consideration, or a consideration of blood, which is more valuable than money, the law raises out of the contract a use in favor of the intended feoffee. The seisin which remains in the feoffor, because the deed is insufficient to pass it, must remain in him bound by the use. This is the effect of the feoffor's own agreement, plainly expressed upon the face of this deed. His agreement by his deed is in law a covenant, and by this simple process does his intended feoffment become, in construction of law, his covenant to stand seised to uses. It is a construction put upon the words of his deed, which his words will bear. So a deed, importing a grant of an interest by two, one intitled in possession, the other in reversion, is, in consideration of law, the grant of the first, and the confirmation of the second. Why? The deed imports to be the grant of a present estate by both, and it is the apparent intent of both that the grantee shall have the estate so granted; but the deed of the latter having no present interest to operate upon as a grant, nothing can pass by it as a grant. But this party has a future interest in the subject, out of which he may make good to the grantee the estate granted to him by the first grantor. This is to be done by a particular species of conveyance called a confirmation. The words which are used in this deed, in their strict technical sense, are words of confirmation as much as they are words of grant. In the mouth of this party, the law says that they are words of confirmation, and shall enure as words of confirmation, in order to give effect to his deed, *ut res magis valeat quam pereat*. Here again the construction which the law puts upon the words of the deed is a construction which the words will bear. The words have several technical senses, of which this is one; and the law prefers this, because it carries into execution the clear intent of the parties, that the estate and interest conveyed by that deed shall pass. In both those cases, we find words interpreted, not in their most general and obvious sense, it is true; but, if they are interpreted in a manner which the *jus et norma loquendi* in conveyances will warrant, there is nothing of violence in such construction. Indeed, I do not know how it would be possible to read a single page of history in any language, without using the same latitude of construction and interpretation of words. To go one step beyond these instances: I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely, that the words may bear the sense which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them. Sir Edward Coke, in his comment upon one of the sections of Littleton's chapter on confirmation, has a passage which is at once an authority for this rule and an illustration of it: 'Here it is to be observed that some words are large and have a general extent, and some have a proper and particular application. The former sort may contain the latter, as *dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c., and it is in the election of the party to use them in pleading, to which of these purposes he will. But a release, confirmation, or surrender, &c., cannot amount to a grant, &c., nor a surrender to a confirmation, or to a release, &c., because these be proper and peculiar manner of conveyances, and are destined to a special end' (Co. Lit. 301, b); or, in other words, 'they are narrow words, and have a particular sense only, and a proper and particular application only.' Having read this passage to the House, I begin to think that I should do well to claim the benefit, on my part of the argument, of the analogy between deeds and bills of exchange, and of the analogy between the rules of construction which govern those instru-

ments respectively. For surely a surrender and a grant are not more unlike each other than a bill of exchange payable to order, and a bill of exchange payable to bearer. And if bills of exchange payable to order, and bills of exchange payable to bearer, are each of them in the nature of proper and peculiar manner of conveyances, and are destined each to a special end, the analogy requires that the one should never be deemed to amount to the other. At least this passage, by putting the construction and operation of deeds, and particularly the deed of grant operating as a confirmation upon a rational and intelligible footing, will help to clear away a part of the argument, which, having the countenance of great authority, deserved great attention on my part, and which has very much perplexed my mind; because, after all the pains I have taken in examining it, I could never see distinctly its application to this case. Indeed, I think it must generally happen that there will be a fallacy in an argument built upon the application of the rules and principles of the common law, more especially the law concerning real property to the law-merchant, or to any other local or limited law. And I am much inclined to think that the fallacy of the argument on the part of these plaintiffs, if there be a fallacy, consists in this, that the distinction between the common law and the law-merchant has not been sufficiently attended to. I can very well understand how the common law, though it refuses its sanction to the acceptance of a bill of exchange, merely as such (as being in the eye of the common law *nudum pactum* only), may interpose between the acceptor, drawer, and payee, to regulate engagements which they may have entered into for a valuable consideration respecting such acceptances; may in a very particular case indemnify an acceptor in paying a bill, or even oblige him to pay such a bill to a person not entitled by the law-merchant to demand it, and to pay it in a course not warranted by that law. We have seen that bills of exchange may become evidence to support the several sorts of *indebitatus assumpsit*. But what I insist upon is that, if a man will demand payment according to the law-merchant, he must bring his case within that law, and in my apprehension can pray in aid nothing of which the law-merchant will not take notice, though it should happen that the common law might take notice of it. Thus, in this case, the plaintiffs, supposing them to be innocent indorsees, may perhaps (I use the word perhaps, because this point is not the point now in judgment), upon the ground of this bill have a remedy at the common law for the wrong done to them in passing upon them a bad bill, where they had a right to expect a good one. But it would be the grossest absurdity in the world for them to insist that because a bill which is bad by the law-merchant was passed upon them for a good one, therefore it became a good one by the same law-merchant, or that it could be made good by the common law *eo nomine*, as a bill of exchange. Another, a different remedy they may have by the common law, and I have no doubt but that the plaintiffs would have sought their remedy in that mode, if bankruptcies and insolvencies had not intervened, which would probably defeat a suit of that nature. This will not be a reason with the House of Lords for straining any point in order to reach this case, inasmuch as it must be at the expense of creditors who have now vested interests in the fund and estates of their debtors, which ought not to be divested or diminished but in the strictest course of law."

The doctrine of the principal case has been generally adopted. *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emett*, 1 H. Bl. 313; *Gibson v. Hunter*, 2 H. Bl. 187, 288; 6 Bro. P. C. 235, s. c.; *The Royal Bank of Scotland*, 19 Ves. 310; *Farnsworth v. Drake*, 11 Ind. 101; *Smith v. Mechanics' Bank*, 6 La. An. 610, 624 (*semble*); *Bartlett v. Tucker*, 104 Mass. 336, 344 (*semble*); *Rogers v. Ware*, 2 Neb. 29 (*semble*); *Foster v. Shattuck*, 2 N. H. 446; *Plets v. Johnson*, 3 Hill, 112; *Stevens v. Strang*, 2 Sandf. 138; *Forbes v. Espy*, 21 Oh. St. 474, 483 (*semble*); *Hunter v. Blodget*, 2 Yeates, 480. — ED.

MEAD v. YOUNG.

IN THE KING'S BENCH, NOVEMBER 18, 1790.

[Reported in 4 Term Reports, 28.]

THIS was an action brought by the indorsee of a bill of exchange for £90 against the acceptor. The bill was drawn at Dunkirk by Christian on the defendant in London, payable "to Henry Davis, or order;" and, having been put into the foreign mail enclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favor it was drawn. The defendant accepted the bill; and, when Davis desired the plaintiff to discount it, the latter made application to the defendant to know whether or not it was his acceptance; and, on receiving an answer in the affirmative, coupled with an assurance that it was a good bill, he discounted it, not knowing the H. Davis from whom he took it. There was no ground to impute any fraud to the plaintiff. On the trial before Lord Kenyon, after the plaintiff had proved the defendant's handwriting, and the indorsement by Davis, the defendant offered evidence to show that the H. Davis, who indorsed to the plaintiff, was not the real H. Davis in whose favor the bill was drawn; but, Lord Kenyon being of opinion that such evidence was inadmissible, the plaintiff recovered a verdict. A rule having been obtained to show cause why a new trial should not be granted on this misdirection,

Erskine and *Shepherd* now showed cause. If there had been any particular description of the payee on the bill, the plaintiff must have taken care that the person from whom he received it answered the whole of the description; but there was no description of, or addition to, the H. Davis: there was nothing on the bill to lead either the acceptor or any third person to suspect that the H. Davis, who was in possession of the bill, was not the real payee. And, so far from the plaintiff's having incurred any charge of neglect, he seems to have taken more than ordinary caution in making inquiries of the acceptor before he discounted the bill. There is no pretence to impute either fraud or neglect to the plaintiff: he stands in the situation of an innocent purchaser for a valuable consideration. This case therefore falls within the common rule, that, where one of two innocent persons must suffer by the fraud of another, the loss must be borne by him who enabled the party to commit the fraud; and in this case that person is Christian, who ought to have described the payee more particularly.

Piggott, Mingay, Law, and Baldwin, in support of the rule. A

party purchasing a bill of exchange is, like the purchaser of any other species of property, bound to inquire into the title of him from whom he buys. No person can derive title to this bill but he who claims under the real H. Davis; and it is indifferent whether the person indorsing the bill be or be not of the same name with the real payee: in neither case, can any property be transferred but by him who has the title. If he bear the same name, *prima facie* indeed, he may be presumed to be the same person, till the contrary be shown; but here the question was, whether evidence should not have been received to prove the contrary. If such evidence be not admissible, it will follow that payment to a person of the same name with a legatee would discharge the executor, or a payment by a debtor to any person who had the same name as his creditor; but that cannot be pretended. This bill was drawn in order to satisfy a debt due from Christian to the real H. Davis; and yet payment of this bill to the plaintiff can never be considered as a discharge of that debt, without the indorsement of that H. Davis. In all cases, where a bill is drawn payable to A. B. or order, it is indispensably necessary to prove the handwriting of the payee, which was not in fact done in this instance. The necessity of this proof is apparent from the form of the declaration; which, after alleging that the bill was drawn in favor of H. Davis, avers that the said H. Davis afterwards indorsed to the plaintiff. If the negligence of either of the parties be resorted to as a ground for the determination of this case, the plaintiff seems to have been guilty of the greatest negligence in taking a bill from a person whom he did not know: whereas the transaction, as far as Christian was concerned, was carried on in the ordinary course of business. There is also another objection to the plaintiff's recovering, because he claims through a forgery; for the H. Davis, who received the bill enclosed in a letter from Christian, must have known that it was not intended for him; and the circumstance of his bearing the same name with the payee would be no defence to him on a prosecution for forgery, since he put a false signature to an instrument with intent to defraud.

LORD KENYON, C. J. The question here is, whether the name of H. Davis, to whom the bill on the face of it was payable, shall or shall not convey a title to this plaintiff, who gave a valuable consideration for it, and who discounted it with the name of H. Davis upon it, and with an assurance from the defendant that it was accepted by him. If any fraud, or even neglect, could be imputed to the plaintiff, that would vary the case; but, circumstanced as these parties were, I think that, if the plaintiff cannot recover, it will put an insuperable clog on this species of property. I cannot distinguish this case on principle from that of *Miller v. Race*, where the innocent holder of a

note, which had been taken when the mail was robbed, was held entitled to recover: that indeed was a note payable to bearer, but still the same principle must govern both cases. In this case, the fault originated with the drawer of the bill in not describing more particularly the person to whom he intended it should be paid. The plaintiff was not bound to send to Dunkirk to know whether the person who had possession of the bill was or was not the real H. Davis. There may, indeed, be some inconvenience the other way; but, setting the inconvenience on the one side against that on the other, in my apprehension it would throw too great a burden on persons taking bills of exchange to require proof of an indorsee that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action; and therefore I think that, as there was no fraud, or want of due diligence on the part of the plaintiff, he is entitled to recover: however, I give this opinion with some diffidence, as my brothers have intimated that they are of a different opinion.

ASHHURST, J. This is a case of considerable importance; and I think that we ought to grant a new trial, that the parties may have an opportunity of putting the question on the record. The present inclination of my opinion is with the defendant. In order to derive a legal title to a bill of exchange, it is necessary to prove the handwriting of the payee; and therefore, though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery; and no title can be derived through the medium of a fraud or forgery. This is distinguishable from the case of *Miller v. Race*; for there the note was payable to bearer: in such cases, the bearer, who purchases for a valuable consideration, and without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge to the drawer. But in this case the bill was drawn payable to H. Davis or order; and though the name of H. Davis were indorsed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be satisfied that that was the indorsement of the real payee.

BULLER, J. As the bill in this case is of great value, the parties may put this question in a mode to be decided by the *dernier ressort*. As at present advised, I entertain the same opinion as my brother Ashhurst. If we were to inquire whether any laches were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more in fault than any other person, in advancing his money to H. Davis, who was a total stranger to him. But, without going into any

such inquiry, I am of opinion that it is incumbent on a plaintiff, who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable. The general form of the declaration shows that it is so; for that is that "the said A. B. to whom, or to whose order, the payment of the said sum of money mentioned in the said bill was to be made, afterwards, &c., indorsed the said bill, his own proper handwriting being thereto subscribed." Now here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable; and no indorsement by any other person will give any title whatever. Then, is there any thing in this case that estops the defendant from saying that the person who indorsed to him was not the real payee? Now the act of that person who indorsed, and who in so doing was guilty of a forgery, cannot prevent an innocent person from showing the truth. Then it was argued that Christian was guilty of negligence, in not describing more particularly the payee; but I know of no authority which requires that to be done. This bill was drawn in the common form, payable "to H. Davis or order;" and the drawer could not foresee that it would get into the possession of any other H. Davis. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill; and it cannot make any difference whether such stranger bear the same name with the real payee or not, for no person can give title to a bill but he to whom it is made payable. Independently of these reasons, I think that convenience requires that the determination should be in favor of the defendant. I have no difficulty in saying that this H. Davis, knowing that the bill was not intended for him, was guilty of a forgery; for the circumstance of his bearing the same name with the payee cannot vary this case, since he was not the same person. Then, if the plaintiff cannot recover on this bill, he will be induced to prosecute the forger; and that would be the case, even if it had passed through several hands, because each indorser would trace it up to the person from whom he received it, and at last it would come to him who had been guilty of the forgery; whereas, if the plaintiff succeed in this action, he will have no inducement to prosecute for the forgery. The drawer, on whom the loss would in that case fall, might have no means of discovering the person who committed the forgery, and thus he would probably escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But, at all events, the plaintiff cannot recover, since he derives his title under a forgery.

GROSE, J. I am of opinion that it was competent to the defendant to show in evidence that the person who indorsed to the plaintiff was

not the person named as the payee in this bill of exchange ; and I form that opinion as well on the substance of the transaction as on the form of pleading in such cases. A bill of exchange is only a transfer of a chose in action, according to the custom of merchants : it is an authority to one person to pay to another the sum which is due to the first, and it is generally directed to be paid to the payee or his order. When the person on whom it is drawn accepts, he only engages by the terms of his acceptance to pay the contents of the bill to the person named in it, or to his order. The general form of the declaration, which is to be found in some of the old entries, also agrees with this doctrine, and points out what the law is. I observe indeed that this declaration is not drawn in the usual form, for the words "to whom or to whose order" are omitted ; but still it is that the said H. Davis, that is the same H. Davis who is mentioned in the former part of the declaration as the payee, indorsed to the plaintiff. It clearly, therefore, appears that as no person can demand payment of a bill of exchange but the payee, or the person authorized by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person. If he pay the amount of the bill to any other person, he pays it in his own wrong, and such payment does not discharge his debt to the drawer. If this decision will prove a clog on the circulation of bills of exchange, I think it will be less detrimental to the public than permitting persons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we consider the definition of it ; which is, the false making of any instrument, indorsement, &c., with intent to defraud.¹ It makes no difference whether the person making this false indorsement were or were not of the same name with the payee, since he added the signature of H. Davis, with a view to defraud, and knowing that he was not the person for whom the bill was intended. I agree also with my brother Buller that this decision will be more convenient to the public, because then the plaintiff will prosecute the person who indorsed to him, for the forgery. For these reasons I am of opinion that, as this bill of exchange was only payable to the payee or his order, it was competent to the defendant, the acceptor, to inquire whether the person under whom the plaintiff claims, were or were not the payee.

*Per Curiam. Rule absolute.*²

¹ See 2 Geo. II. c. 25, § 1.

² *Esdaile v. La Nauze*, 1 Y. & C. 394 ; *York Bank v. Asbury*, 1 Biss. 230 ; *Lancaster v. Baltzell*, 7 Gill & J. 468, *accord*.

See also *Espy v. Cincinnati Bank*, 18 Wall. 604 ; *Dick v. Leverich*, 11 La. 573 ; *McCall v. Corning*, 3 La. An. 409 ; *McKleroy v. Southern Bank*, 14 La. An. 458 ; *Third Nat. Bank v. Allen*, 59 Mo. 310 ; *Canal Bank v. Albany Bank*, 1 Hill, 287 ; *Merchants'*

MASTER AND OTHERS *v.* MILLER.

IN THE KING'S BENCH, JULY 1, 1791.

[*Reported in 4 Term Reports, 320.*]

THE first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor: it stated that Peel & Co., on the 20th of March, 1788, drew a bill for £974 10s., on the defendant, payable three months after date, to Wilkinson & Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue, on the trial of which a special verdict was found.

It stated that Peel & Co., on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson & Cooke, for £974 10s., "Which said bill of exchange, made by the said Peel & Co., as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced and read in evidence to the said jurors, and is now expressed in the words and figures following, to wit:—

‘June 23d. £974 10s.

MANCHESTER, March 20, 1788.

‘Three months after date, pay to the order of Messrs. Wilkinson & Cooke £974 10s. received as advised. PEEL, YATES, & Co.

‘To Mr. CHAS. MILLER, C. M.

23d June, 1788.’”

That Peel & Co. delivered the said bill to Wilkinson & Cooke, which the defendant afterwards, and before the alteration of the bill hereinafter mentioned, accepted. That Wilkinson & Cooke afterwards indorsed the said bill to the plaintiffs for a valuable consideration, before that time given and paid by them to Wilkinson & Cooke for the same. That the said bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of Wilkinson & Cooke as aforesaid, bore date on the 26th day

Bank v. McIntyre, 2 Sandf. 431; *Holt v. Ross*, 54 N. Y. 472; *Chambers v. Union Bank*, 78 Pa. 205; in which cases it was held that money paid under a forged indorsement might be recovered by the drawee from an innocent holder for value, as having been paid under a mistake of fact. But see *Stout v. Benoist*, 39 Mo. 277, *contra*, and *conf. Leather v. Simpson*, L. R. 11 Eq. 398; *Hoffman v. Milw. Bank*, 12 Wall. 181; *First Bank v. Burkham*, 32 Mich. 328; *Craig v. Sibbett*, 15 Pa. 238. — ED.

of March, 1788, the day of making the same. And that after it so came to and whilst it remained in the hands of Wilkinson & Cooke, the said date of the said bill, without the authority or privity of the defendant, was altered by some person or persons to the jurors aforesaid unknown from the 26th day of March, 1788, to the 20th day of March, 1788. That the words "June 23d," at the top of the bill, were there inserted to mark that it would become due and payable on the 23d of June next after the date; and that the alteration hereinbefore mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23d of June, and also on the 28th of June, 1788, presented to the defendant for payment; on each of which days respectively, he refused to pay. The verdict also stated that the bill so produced to the jury and read in evidence was the same bill, upon which the plaintiffs declared, &c.

This case was argued in Hilary term last, by *Wood* for the plaintiffs, and *Mingay* for the defendant; and again on this day by *Chambre* for the plaintiffs, and *Erskine* for the defendant.

For the plaintiffs, it was contended that they were entitled, notwithstanding the alteration in the bill of exchange, to recover according to the truth of the case, which is set forth in the second count of the declaration, viz., upon a bill dated the 26th March, which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part, and upon a supposed analogy between those instruments and bills of exchange. But, upon investigating the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills; and, if that be shown, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in *Pigot's Case*,¹ where most of the authorities are collected; from thence it appears that if a deed be altered in a material point even by a stranger, without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instru-

¹ 11 Co. 27.

ments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction; and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party, in whose possession it was lodged, should, on account of its superior authenticity, be bound to preserve it entire with the strictest attention, and at the peril of losing the benefit of it in the case of any material alteration even by a stranger. And that he is the better enabled to do from the nature of the instrument itself, which not being of a negotiable nature is not likely to meet with any mutilation, unless through the fraud or negligence of the owner; whereas, bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertence of those by whom they are negotiated, without any possibility of their being discovered by innocent indorsees, who are ignorant of the form in which they were originally drawn or accepted. And the present is a strong instance of that; for the plaintiffs cannot be said to be guilty of negligence in not inquiring how the blot came on the bill, which mere accident might have occasioned. That the same reasons upon which the decisions of the courts upon deeds have been grounded will not support such judgments upon bills, will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a *profert in curiam*, unless as in *Read v. Brookman*¹ it be lost or destroyed by accident, which must however be stated in the pleadings. The reason of which is that anciently the deed was actually brought into court for the purpose of inspection; and if, as is said in 10 Co. 92, b, the judges found that it had been rased or interlined in any material part, they adjudged it to be void. Now, as that was the reason why a deed was required to be pleaded with a *profert*, and as it never was necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds in which were erasures were held void, because they appeared on the face of them to be suspicious. 13 Vin. Abr. tit. Faits, 37, 38; Bro. Abr. Faits, pl. 11, referring to 44 Ed. 3, 42. Nor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in *Moor*, 35, pl. 116, a deed which had been raised was held void, although the party himself who made it had made the erasure, which was permitting a party to avail himself of his own fraud. But it is impossible to contend that the rule

can be carried to the same extent as to bills; nor is it denied but that, if the blot here had been made by the acceptor himself, he would still have been bound. In *Keilw.* 162, it is said that, if A. be bound to B. in £20 and B. rase out £10, all the bond is void, although it is for the advantage of the obligor; and even where an alteration in a deed was made by the consent of both the parties, still it was held to avoid it. 2 *Rol. Abr.* 29, letter U, pl. 5. [LORD KENYON observed that there had been decisions to the contrary since.] Fraud could not be the principle on which those cases were determined; whereas, it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it. 2 *Rol. Abr.* 29, pl. 6. And it does not abate the force of the argument that the law is relaxed in these respects even as to deeds, for the question still remains whether at any time bills of exchange were construed with the same rigor as deeds. The principle upon which all these cases relative to deeds was founded was that nothing could work any alteration in a deed, except another deed of equal authenticity. And, as the party who had possession of the deed was bound to keep it securely, it might well be presumed that any material alteration even by a stranger was with his connivance, or at least through his culpable neglect. In many of the cases upon the alteration of deeds, the form of the issue has weighed with the court; as in 1 *Rol. Rep.* 40 [which is also cited in *Pigot's Case*, 11 *Co.* 27], and *Michael v. Scockwith*,¹ in both which cases the alteration was after plea pleaded; and on that ground the court held it was still to be considered as the deed of the party on *non est factum*. Now the form of the issue in actions upon deeds and those upon bills is very different; in the one case, the issue simply is whether it is the deed of the party which goes to the time of the plea pleaded, as appears from the case before cited, and from 5 *Co.* 119 b, & *Dy.* 59; but here the issue is whether the defendant promised at the time of the acceptance to pay the contents. The form of the issue is upon his promise, arising, by implication of law from the act of acceptance, which is found as a fact by the special verdict agreeable to the bill declared on in the second count. And in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from showing the truth of the case. Not only therefore the forms of pleading are different in the two cases; but the decisions which have been made upon deeds from whence the rule contended for as to

¹ *Cro. El.* 120.

erasures and alterations is extracted are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case do not exist in the other. On the contrary, all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of *Minet v. Gibson* goes much further than the present; for there this court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties, although such circumstances operated to establish a different contract from that which appeared upon the face of the bill itself. Whereas, the evidence given in this case, and the facts found by the special verdict, are in order to show what the bill really was; which it is competent for these parties to do against whom no fraud can be imputed, if any exist. If the blot had fallen on the paper by mere accident, it cannot be pretended that it would have avoided the bill; and *non constat* upon this finding that it did not so happen. Even if felony were committed by a third person, through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party, to whom the bill is indorsed or delivered for a valuable consideration. In *Miller v. Race*, where a bank-note had been stolen, and afterwards passed *bona fide* to the plaintiff, it was held that he might recover it in *trover* against the person who had stopped it for the real owner. And the same point was held in *Peacock v. Rhodes*, where the bill was payable to order. Again, in *Price v. Neale*, it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could not recover back the money from him. Now, if it be no answer to an action upon a bill against the acceptor, to show that it was a forgery in its original making, by a third person's having feigned the handwriting of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases, if the deed had been forged in any respect even by strangers to it, which shows that these several instruments cannot be governed by the same rules. And so little have the forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in *Russell v. Langstaffe* the court held, in order to get at the justice of the case, that a person who had indorsed his name on blank checks which he had intrusted to another was liable to an indorsee for the sums for which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn before the indorsement. But the case which is most immediately in point to the present is that of *Price v.*

Shute.¹ There a bill was drawn payable to the 1st of January: the person upon whom it was drawn accepted it to be paid the 1st of March; the holder upon the bills being brought back to him, perceiving this enlarged acceptance, struck out the 1st of March, and put in the 1st of January; and then sent the bill to be paid, which the acceptor refused. Whereupon, the payee struck out the 1st of January, and put in the 1st of March again. And in an action brought on this bill the question was, whether these alterations did not destroy it. And it was ruled they did not. This case therefore has settled the doubt; and having never been impeached, but on the contrary recognized, as far as general opinion goes, by having been inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise; for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill of exchange is by the ordinary course of such transactions obliged to trust it even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But, even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents upon the same principle as governed the case of *Read v. Brookman*,² where it was held that pleading that a deed is lost by time and accident supersedes the necessity of a profert. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock v. Harris*;³ for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

For the defendant, it was contended that the broad principle of law was, that any alteration of a written instrument in a material part thereof avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only, because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities; and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity, which would be the case if, after being detected in the attempt, he were not

¹ 2 Moll. c. 10, f. 28.² 3 T. R. 151.³ 3 T. R. 174.

to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that, because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds, where fraud was not so likely to be practised. The principle laid down in *Pigot's Case* is not disputed, as applied to deeds. But the first answer attempted to be given is that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this, it is sufficient to say that no such reason is suggested in any of the books; but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given. Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense: the substance of the issue in both cases is whether in point of law the party be liable to answer upon the instrument declared on; and therefore any matter which either avoids it *ab initio*, or goes in discharge of it, may be shown as much in the one case as in the other. Upon *non est factum*, the question is whether in law the deed produced in evidence be the deed of the party; so on *non assumpsit* the question is whether the bill given in evidence be in point of law the bill accepted by the defendant, because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now, neither of the counts in the declaration was proved by the facts found. For, in the first count, the bill is dated the 20th of March; but, as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither can they recover on the second; because, though it is found that he accepted a bill dated the 26th of March, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count. With respect to the cases cited of bills of exchange having been always construed by the most liberal principles, and particularly in the case of *Minet v. Gibson*, the same answer may be given to all of them, which is that, so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party, who, in the latter case particularly, endeavored by a trick to evade the contract. Whereas, here the contract has been substantially altered by the parties who endeavor to enforce it, or at least by those

whom they represent, and from whom they derive title. Then the case in *Molloy of Price v. Shute* is chiefly relied on by the plaintiffs, to which several answers may be given. First, the authenticity of it may be questioned; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill, as originally drawn, was not altered upon the face of it; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then, if this bill be void for this fraud, no evidence could be given to prove its contents, as in the case of a deed lost, because in that there is no fraud. But, even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts, if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration, upon which ground the case of *Tatlock v. Harris* was decided.

In reply, it was urged that the issue was not whether the defendant had accepted this bill in the state in which it was shown to the jury, but whether he had promised to pay in consequence of having accepted a bill dated the 26th March, drawn by, &c.; and, those facts being found, the promise necessarily arises. It is said that the policy of the law will extend the same rule to the avoidance of bills of exchange, which have been altered, as to deeds; because there is even greater reason to guard against fraudulent alterations in the former than in the latter case. To which it may be answered that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed; and it is admitted that, if the blot had been made by accident, it would not have avoided the bill, and nothing is stated to show that it was not done by accident. Besides, the policy of the law is equally urgent in favor of the plaintiffs, it being equally politic to compel a performance of honest engagements. Here the defendant is only required to do that which in fact and in law he has promised to do; and, if he be not liable on this contract, he will be protected in withholding payment of that money which he has received, and which by the nature of his engagement he undertook to repay. No answer has been given to the case cited from *Molloy*; for, though the case is not reported in any other book, it bears every mark of authenticity, by

noting the names of the parties, the court in which it was determined, and the time of the decision; and it has been adopted by subsequent writers on the same subject. Again, the alteration there was full as important as this, for it equally tended to accelerate the day of payment; and, lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor, which is an admission that the policy of the law does not attach so as to avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

LORD KENYON, C. J. The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument. For the instrument is the only mean by which they can derive a right of action. The right of action, which subsisted in favor of Wilkinson & Cooke, could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited either on one side or the other except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar, which, in point of law as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why in point of policy would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected. At the time when the cases cited of deeds were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and, therefore, the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanor and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made by accident; for here it is stated that this alteration was made while the bill was in the possession of Wilkinson & Cooke, who were then entitled to the amount of it, and from whom the plaintiffs derive title, and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deeds only. Therefore, those decisions which were indeed confined to deed applied to the then

state of affairs ; but they establish this principle, that all written instruments which were altered or erased should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in *Ward's Case*,¹ whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature ; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds ; and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from *Molloy* indeed at first made a different impression on my mind ; but, on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself ; but the party to whom it was directed accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance ; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought ; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, " that the alterations did not destroy the bill," it does not affect this case : not an iota of the bill itself was altered ; but, on the person to whom the bill was directed refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case, — at least, that none is found ; but I think that if it had been done by accident, that should have been found to excuse the party, as in one of the cases, where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saying that a defendant is liable, on *non assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment ; but the question is whether or not the defendant promised in the form stated in the declaration, and the substance of that plea is that, according to that form, he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it ; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

¹ 2 Str. 747, and 2 Lord Raym. 1461.

ASHHURST, J. It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax. And a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action; but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in the possession of Wilkinson & Cooke; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them; at all events, it was their business to preserve the bill without any alteration. If Wilkinson & Cooke had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody; then, if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs who derive title under them. For, wherever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty to inquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favor of the latter; but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange which are daily circulated from hand to hand should be preserved with greater purity than deeds, which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

GROSE, J.¹ The only question in this case is whether there appears on the face of this special verdict a right of action in the plaintiffs on

¹ Mr. Justice Buller thought that the plaintiff was entitled to judgment in the second count, and also upon the counts for money paid, and money had and received. His opinion, which has not met with favor, has been omitted on account of its great length. — ED.

any of the counts. The first count is on a bill of exchange dated the 20th of March ; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March ; but the defendant objects to the plaintiffs' recovering on this count also, because, the bill having been altered while it was in the hands of Wilkinson & Cooke, it is not the same bill as that which was accepted ; and that is the true and only question in the cause. My idea is that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular choses in action to be transferred from one person to another. The plaintiffs as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson & Cooke to them, and that this was the bill which was presented when it became due. Now, has all this been proved ? The bill was drawn on the 26th of March, payable at three months' date ; the defendant's engagement by his acceptance was that it should be paid when it became due, according to that date ; but afterwards the date was altered. The date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days. According to that alteration, the payment was demanded on the 23d of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March : then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel & Co. and accepted by the defendant ; and here the cases which were cited at the bar apply. Piggot's is the leading case : from that I collect that when a deed is erased whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed ; and, 2dly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds ; but it is said that that law does not extend to the case of a bill of exchange : whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated ; viz., that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case, the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under

seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party in whose favor it is made from attempting to make any alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for £100, and after acceptance the sum was altered to £1000: it is not pretended that the acceptor shall be liable to pay the £1000; and I say that he cannot be compelled to pay the £100, according to his acceptance of the bill, because it is not the same bill. So, if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that *Piggot's Case* only shows to what time the issue relates; but it goes further, and shows that, if the instrument be altered at any time before plea pleaded, it becomes void. It is true the court will inquire to what time the issue relates in both cases. Then to what time does the issue relate here? The plaintiffs in this case undertook to prove every thing that would support the assumpsit in law, otherwise the assumpsit did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill which was produced in evidence to the jury was accepted by the defendant, presented, and refused; but, if the bill which was accepted by the defendant were altered before it was presented for payment, then that identical bill which was accepted by the defendant was not presented for payment: the defendant's refusal was a refusal to pay another instrument; and, therefore, the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar that the inquiry before a jury in an action like the present should be whether or not the defendant promised to pay the bill at the time of his acceptance; but, granting that he did so promise, that alone will not make him liable unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my Lord on the case of *Molloy*; but the note of that case is a very short one, and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also

whether it was a determination of this court : it only appears that there was a point made at *nisi prius*, but not that it was afterwards argued here. But it has been said that a decision in favor of the plaintiffs will be the most convenient one for the commercial world : but that is much to be doubted ; for if, after an alteration of this kind, it be competent to the court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions ; and I conceive that keeping a strict hand over the holders of bills of exchange to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

*Per Curiam. Judgment for the defendant.*¹

¹ Affirmed in 1 Anst. 225.

It is well settled, in accordance with the principal case, that the transfer of a bill or note which has been materially altered after its issue in a completed state, passes no title, even to an innocent holder for value as against those persons who signed the instrument in its original state. Those persons are not parties to the instrument which the holder received. He is not a party to the instrument which they executed. The main question in this class of cases has been as to the materiality of the alteration.

In the following cases, the alteration was material : —

DATE OR TIME OF PAYMENT: *Rex v. Atkinson*, 7 C. & P. 669; *Outhwaite v. Luntley*, 4 Camp. 180; *Long v. Moore*, 3 Esp. 155, n.; *Cock v. Coxwell*, 2 Cr. M. & R. 291; *Parry v. Nicholson*, 13 M. & W. 778; *Hirschman v. Budd*, L. R. 8 Ex. 171; *Vance v. Lowther*, 1 Ex. D. 176; *Bowman v. Nichol*, 5 T. R. 537; *Cardwell v. Martin*, 9 East, 190; *Bathe v. Taylor*, 15 East, 412; *Walton v. Hastings*, 1 Stark. 215; *Wilson v. Justice, Peake*, Add. 96; *Wood v. Steele*, 6 Wall. 80; *Benedict v. Miner*, 58 Ill. 19; *Lisle v. Rogers*, 18 B. Mon. 528; *Hervey v. Harvey*, 15 Me. 357; *Mitchell v. Ringgold*, 3 Har. & J. 159; *Davis v. Jenney*, 1 Met. 221; *Aubuchon v. M'Knight*, 1 Mo. 312; *Owings v. Arnot*, 33 Mo. 406; *Britten v. Dierker*, 46 Mo. 591; *Bowers v. Jewell*, 2 N. H. 543; *U. S. Bank v. Russel*, 3 Yeates, 391; *Stephens v. Graham*, 7 S. & R. 505; *Hocker v. Jamison*, 2 W. & S. 438; *Kennedy v. Lancaster Bank*, 18 Pa. 347; *Miller v. Gilleland*, 19 Pa. 119; *Paine v. Edsell*, 19 Pa. 178; *Heffner v. Wenrich*, 32 Pa. 423; *Crockett v. Thomason*, 5 Sneed, 342.

But see *contra* *Union Bank v. Cook*, 2 Cr. C. C. 218.

AMOUNT: *Leith v. Elphinston* (Court of Session), Jan. 16, 1734; *Rex v. Post, Russ. & Ry.* 101; *Chism v. Toomer*, 27 Ark. 108; *Ætna Bank v. Winchester*, 43 Conn. 391; *Pankey v. Mitchell*, 1 Ill. 301; *Agawam Bank v. Sears*, 4 Gray, 95; *Trigg v. Taylor*, 27 Mo. 245; *Goodman v. Eastman*, 4 N. H. 455; *Ogle v. Graham*, 2 Pa. 132; *Bogarth v. Breedlove*, 39 Tex. 561.

RATE OF INTEREST: *Warrington v. Early*, 2 E. & B. 763; *Brown v. Jones*, 3 Port. 420; *Warpole v. Ellison*, 4 Houst. 322; *Benedict v. Miner*, 58 Ill. 19; *Kountz v. Hart*, 17 Ind. 329; *Hart v. Clouser*, 30 Ind. 210; *Schnewind v. Hackett*, 54 Ind. 248; *Waterman v. Vose*, 43 Me. 504; *Lee v. Starbird*, 55 Me. 491; *Fay v. Smith*, 1 All. 477; *Draper v. Wood*, 112 Mass. 315; *Ivory v. Michael*, 33 Mo. 398; *Presbury v. Michael*, 33 Mo. 542; *Darwin v. Rippey*, 63 N. Ca. 318; *Dewey v. Reed*, 40 Barb. 16; *Boalt v. Brown*, 13 Oh. St. 364; *Patterson v. McNeeley*, 16 Oh. St. 348; *Neff v. Horner*, 63 Pa. 327; *Fulmer v. Seitz*, 68 Pa. 237; *Kilkelly v. Martin*, 34 Wis. 525.

PLACE OF PAYMENT: *Burchfield v. Moore*, 3 E. & B. 683; *Rex v. Treble*, 2 Taunt. 328; *Cowie v. Halsall*, 4 B. & Al. 197; *Tidmarsh v. Grover*, 1 M. & Sel. 735; *Stevens v. Lloyd*, M. & M. 292; *Macintosh v. Haydon*, Ry. & M. 362; *Desbrowe v. Wetherley*, 6 C. & P. 758; *Taylor v. Mosely*, 6 C. & P. 273; *Calvert v. Baker*, 4 M. & W. 417; *Comm. Bank v. Patterson*, 2 Cr. C. C. 346; *White v. Hass*, 32 Ala. 430; *Sudler v. Collins*, 2 Houst. 538; *Whitesides v. Northern Bank*, 10 Bush, 501; *Oakey v. Wilcox*, 4 Miss. 330; *Bank of America v. Woodworth*, 18 Johns. 315; 19 Johns. 391, s. c.; *Nazro v. Fuller*, 24 Wend. 374; *Sturges v. Williams*, 9 Oh. St. 443; *Simpson v. Stackhouse*, 9 Barr, 186; *Southwark Bank v. Gross*, 35 Pa. 80; *Hill v. Cooley*, 46 Pa. 259. But see *Trapp v. Spearman*, 3 Esp. 57; *Merson v. Petit*, 1 Camp. 81, n.; *Walter v. Cubley*, 2 Cr. & M. 151; *Major v. Hansen*, 2 Biss. 195.

PAYEE: *Horst v. Wagner*, 43 Iowa, 373; *Stoddard v. Penniman*, 108 Mass. 366; *Cumberland Bank v. Penniman*, 1 Halst. 215; *Broughton v. Fuller*, 9 Vt. 373.

WORDS OF NEGOTIABILITY: *Scott v. Walker*, *Dudley* (Ga.) 243; *Johnson v. U. S. Bank*, 2 B. Mon. 310; *Belknap v. Nat. Bank*, 100 Mass. 376; *Booth v. Powers*, 56 N. Y. 22; *Pepoon v. Stagg*, 1 N. & McC. 102; *Morehead v. Parkersburg Bank*, 5 W. Va. 74. But see *Flint v. Craig*, 59 Barb. 319.

FORM OF INDORSEMENT: *Hirschfeld v. Smith*, L. R. 1 C. P. 340; *Farmer v. Rand*, 14 Me. 225; 16 Me. 453, s. c.

ADDITION OF SPECIAL CONSIDERATION AFTER "VALUE RECEIVED:": *Knill v. Williams*, 10 East, 431; *Wright v. Inshaw*, 1 Dowl. N. s. 802 (*semble*).

ADDITION OF SEAL: *Fullerton v. Sturges*, 4 Oh. St. 529; *Biery v. Haines*, 5 Whart. 563.

INSERTION OF "WITHOUT DEFALCATION," &c.: *Davis v. Carlisle*, 6 Ala. 707.

SIGNATURE OF SUBSCRIBING WITNESS: *Brackett v. Mountfort*, 11 Me. 115; *Homer v. Wallis*, 11 Mass. 309; *Sharpe v. Bagwell*, 1 Dev. Eq. 115.

Conf. Ford v. Ford, 17 Pick. 418.

JOINT TO JOINT AND SEVERAL LIABILITY: *Perring v. Hone*, 4 Bing. 28; *Humphreys v. Guillow*, 13 N. H. 385; *Miller v. Reed*, 27 Pa. 244 (*semble*).

But see *Eddy v. Bond*, 19 Me. 461, *contra*.

ADDITION OR REMOVAL OF SIGNATURE OF A MAKER, &c.: *Clerk v. Blackstock*, *Holt*, N. P. 474; *Gardner v. Walsh*, 5 E. & B. 83 (*overruling* *Catton v. Simpson*, 8 A. & E. 186); *Ex parte Yates*, 2 DeG. & J. 191 (*semble*); *Mason v. Bradley*, 11 M. & W. 590 (*semble*); *McEwen v. Graham* (Court of Session), Nov. 21, 1833; *Gillett v. Sweat*, 6 Ill. 475; *Henry v. Coats*, 17 Ind. 161; *Bowers v. Briggs*, 20 Ind. 139; *Hall v. McHenry*, 19 Iowa, 521; *Dickerman v. Miner*, 43 Iowa, 508; *Limestone Bank v. Penick*, 5 Mon. 25, 32; *Shipp v. Suggett*, 9 B. Mon. 5; *Haskell v. Champion*, 30 Mo. 136; *Chappell v. Spencer*, 23 Barb. 584; *McVean v. Scott*, 46 Barb. 379; *Wallace v. Jewell*, 21 Oh. St. 163; *Davis v. Coleman*, 7 Ired. 424.

But see *contra*, *M'Ara v. Watson* (Court of Session), June 3, 1823; *Montgomery R.R. v. Hurst*, 9 Ala. 513; *Broughton v. West*, 8 Ga. 248; *Miller v. Finley*, 26 Mich. 249; *Muir v. Demaree*, 12 Wend. 468; *McCaughy v. Smith*, 27 N. Y. 39 (*semble*); *Brownell v. Winnie*, 29 N. Y. 400 (*semble*); *Card v. Miller*, 3 Th. & C. 635; 1 Hun, 504, s. c.; *Huntington v. Finch*, 3 Oh. St. 445.

CORRECTION OF A MISTAKE. An alteration made to correct a mutual mistake, and to give the instrument the form intended by the parties, has been held not to affect its validity. *Jacob v. Hart*, 6 M. & Sel. 142; *Brutt v. Picard*, Ry. & M. 37; *Kershaw v. Cox*, 3 Esp. 246; *Knill v. Williams*, 10 East, 431; *Byrom v. Thompson*, 11 A. & E. 31; *Hamelin v. Bruck*, 9 Q. B. 306; *Cariss v. Tattersall*, 2 M. & G. 890; *Henderson v. Hay* (Court of Session), Feb. 20, 1802; *Hanson v. Crawley*, 41 Ga. 303; *Murray v. Graham*, 29 Iowa, 520; *Duker v. Franz*, 7 Bush, 273; *Hervey v. Harvey*, 15 Me. 357 (*semble*); *Hunt v. Adams*, 6 Mass. 519; *Ames v. Colburn*, 11 Gray, 390; *Conner v. Routh*, 8 Miss. 176; *McRaven v. Crisler*, 53 Miss. 542; *Boyd v. Brotherston*, 10 Wend. 93; *Clute v. Small*, 17 Wend. 238; *Bowers v. Jewell*, 2 N. H. 543 (*semble*); *Cole v. Hills*, 44 N. H. 227.

But see *Letcher v. Bates*, 6 J. J. Marsh. 524 (*overruled*); *Hunt v. Gray*, 35 N. J. 231 (*semble*), *contra*.

IMMATERIAL ALTERATIONS. In the following cases, the alterations being immaterial did not affect the validity of the bill or note: *Aldons v. Cornwell*, L. R. 3 Q. B. 573; *Farquhar v. Southey*, 2 C. & P. 497; *Simmons v. Taylor*, 2 C. B. n. s. 528; 4 C. B. n. s. 463, n. c.; *Houghton v. Francis*, 29 Ill. 244; *Foote v. Bragg*, 5 Blackf. 363; *Smith v. Lockridge*, 8 Bush, 423; *Woodfolk v. Bank of N. A.*, 10 Bush, 504; *Bachelor v. Priest*, 12 Pick. 399; *Granite Co. v. Bacon*, 15 Pick. 239; *Commw. v. Emigrant Bank*, 98 Mass. 12; *Herrick v. Baldwin*, 17 Minn. 209; *Moye v. Herndon*, 30 Miss. 120; *Bridges v. Winters*, 42 Miss. 135; *Birdsall v. Russell*, 29 N. Y. 239; *Hubbard v. Williamson*, 5 Ired. 397; *Dunn v. Clements*, 7 Jones, 58; *Schryver v. Hawkes*, 22 Oh. St. 308; *Struthers v. Kendall*, 41 Pa. 214; *Smith v. Smith*, 1 R. I. 398; *Arnold v. Jones*, 2 R. I. 345; *Mouchet v. Cason*, 1 Brev. 307; *Blair v. Tenn. Bank*, 11 Humph. 84; *Reed v. Roark*, 14 Tex. 329; *Derby v. Thrall*, 44 Vt. 413.

ALTERATION BY A STRANGER. In England, a plaintiff must preserve the integrity of a contract in writing, to which he is a party, at his peril. *Davidson v. Cooper*, 11 M. & W. 778; 13 M. & W. 343, s. c. Accordingly, a material alteration by a stranger will destroy the previously acquired title of the holder of a bill or note.

In the United States, on the other hand, one who has acquired the title to a bill or note may treat a subsequent alteration by a stranger as a nullity, and recover upon the instrument as if it retained its original purity. *Piersol v. Grimes*, 30 Ind. 129; *Lee v. Alexander*, 9 B. Mon. 25 (*overruling Letcher v. Bates*, 6 J. J. Marsh. 524); *Medlin v. Platte Co.*, 8 Mo. 235; *Lubbering v. Kohlbrecher*, 22 Mo. 596; *Presbury v. Michael*, 33 Mo. 542; *Hunt v. Gray*, 35 N. J. 227; *Neff v. Horner*, 63 Pa. 327 (*semble*). See also *Fullerton v. Sturges*, 4 Oh. St. 529; *Bigelow v. Stilphen*, 35 Vt. 521; in which cases the courts went so far as to allow the payee to maintain an action upon a note which had been altered by a stranger, after it had passed from the hands of the maker, but before it was delivered to the payee.

INNOCENT ALTERATION BY THE HOLDER. In the following cases, a material alteration by the holder of a bill or note, being made without fraudulent intention, was held not to prejudice the right of the holder to recover upon the instrument in its original state: *Price v. Shute*, 2 Moll. c. 10, § 28; *Wheat v. Arnold*, 36 Ga. 479; *Horst v. Wagner*, 43 Iowa, 373; *Rollins v. Bartlett*, 20 Me. 319; *Thornton v. Appleton*, 29 Me. 298; *Nevins v. Degrand*, 15 Mass. 436; *Smith v. Durham*, 8 Pick. 246; *Willard v. Clarke*, 7 Met. 435; *Van Brunt v. Goff*, 35 Barb. 601; *Kountz v. Kennedy*, 63 Pa. 187 (criticised in *Fulmer v. Seitz*, 68 Pa. 237).

But see *Krause v. Meyer*, 32 Iowa, 566; *Fay v. Smith*, 1 All. 477; *Miller v. Gilleland*, 19 Pa. 123.—ED.

COLLINS v. MARTIN AND OTHERS.

IN THE COMMON PLEAS, FEBRUARY 13, 1797.

[Reported in 1 Bosanquet & Puller, 648.]

THIS was an action of trover for two bills of exchange deposited with the defendants under the following circumstances: The bills were sent by the plaintiff to Messrs. Nightingales, his bankers, indorsed in blank, in order to be received by them when due, and to be carried to his account. In the bankers' book, they were entered short; and the balance of account between the bankers and the plaintiff was in favor of the latter. The Nightingales being in want of money deposited the bills in question, among others, with the defendants, who were also bankers, and gave them an acknowledgment in writing for a sum of money received upon this deposit. The Nightingales having failed, this action was brought to recover the bills. Eyre, C. J., before whom the cause was tried at the Guildhall sittings after Michaelmas term, 1796, finding upon inquiry that there was no evidence to show that the defendants knew the circumstances under which the bills came into the hands of the Nightingales, or the situation of the account between them and the plaintiff, directed a nonsuit. To set aside this nonsuit, a rule *nisi* having been obtained upon a former day,

Le Blanc and *Palmer*, Serjts., in the course of the term showed cause. This case may be decided without breaking in upon the doctrine of pledges, or denying that bankers are in some respects factors. The fallacy upon which the motion to set aside the nonsuits proceeds is this, — that bankers are to be taken absolutely as factors in every case. To that extent, however, the cases have not gone; though, where a question has arisen between the assignees of a banker who has failed and his customer, the courts have compared the banker to a factor, as in *Zinck v. Walker*.¹ The analogy does not hold between bills and goods, for the possession of goods does not vest the property, since the transferee's title can never be better than the transferrer's. But, with respect to bills, the whole property in them passes by indorsement; and it is immaterial to the person who takes a bill with a blank indorsement whether the title of him from whom he takes it be good or not. This distinction has been acknowledged even in cases where the title to a bill has been derived to the holder, from persons who obtained it by finding or theft. *Grant v. Vaughan* and *Miller v. Race*. It makes no difference whether the conveyance of these bills was absolute, or whether it was only *sub modo* as to the

¹ 2 Bl. 1154.

time or conditions under which they were to be held. The plaintiff having parted with the whole property in the bills, and put them into the hands of the Nightingales like a marked guinea or a bank-note, the only question is, whether the defendants, when they received them from the Nightingales, paid a valuable consideration for them. That indeed is not denied; but the exception taken is to the mode of transfer. In fact, the defendant discounted the bills for a part of the time which they had to run, the Nightingales reserving to themselves the power of redemption. In the case of *Goldsmud and Another v. Gaden and Another* in Chancery, 13th June, 1796, the plaintiffs, who were brokers, advanced money on three navy bills and a deposit of scrip; and though it afterwards appeared that both navy bills and scrip were left by the defendants in the hands of the party depositing, for a particular purpose, and were not his property, but the property of the defendants, yet on a bill filed in equity, it was referred to the Master to take an account of what was due to the plaintiffs, and an issue at law was refused by the Chancellor, who thought the question too clear to be disputed. Now, as navy bills pass by an indorsement in blank, and are not filled up till the holder comes for the money, they may be compared to bills of exchange indorsed in blank by the payee. The only question which has ever arisen in cases of this kind has been whether the holder came honestly by the bills. As in *Hinton's Case*¹ and *Crawley v. Crowther*,² both cited by Lord Mansfield in *Grant v. Vaughan* and *Peacock v. Rhodes*.

Shepherd and *Heywood*, Serjts., in support of the rule. It may be admitted that there is a distinction between goods and bills, though not to the extent contended for. Generally speaking, the property in goods sold does not pass by the sale, where the vendor is not entitled to sell; but, if they be sold in market overt, it does, because the sale is in the ordinary course of trade. So the property in these bills did not pass to the defendants, because they were not negotiated in the ordinary course, and therefore they are subject to the same restriction as goods. It is true that the Nightingales themselves gained such a property in these bills as would have enabled them by transfer to convey the absolute property to a third person; but they were not entitled to deposit them with a third person by way of pledge. If the factor, who has a lien upon goods or bills of his principal, cannot transfer that lien to another, *Daubigny v. Duval*,³ much less can he who has no lien, as in this case, create a lien in his transferee. The use which was made of these bills was clearly a fraud in the Nightingales, to whom they were remitted for safe custody, and were by them entered short in their books. An attempt has been made to

¹ 2 Shower, 235.² 2 Freem. 257.³ 5 T. R. 604.

liken bills of exchange to navy bills; but in *Maclish v. Ekins*¹ it was held that a navy bill would not pass without an assignment. The negotiability of any instrument depends on the nature of the instrument. Now, it is the nature of a navy bill to be passed without any indorsement, and therefore it is the usual course to pledge them. In *Ford v. Hopkins*,² where lottery tickets had been lodged with a banker that he might receive the money due on them, it was held that he could not exchange them. A bill indorsed in blank to a banker is so indorsed, either to enable him to receive the amount or to assign it absolutely: third persons know that a banker has these two powers; but they also know that he has not the power to pledge. If, therefore, they take a bill from a banker indorsed in blank as a pledge, they take it at their peril, for the indorsement is not even *prima facie* evidence of a right to pledge.

Curr. adv. vult.

The opinion of the court was this day delivered by

EYRE, C. J. We are all of opinion that this plaintiff was properly nonsuited; and that there ought to be no new trial. I have little to add to what I stated to be the ground of this nonsuit when I made my report. The counsel for the plaintiff admitted that the bankers might have sold these bills; but it was argued that they could not pledge them, and the case of a factor pledging the property of his principal was urged as an authority, for it was said that bankers have been considered as factors. In questions between bankers, or those representing them, and their customers, they have been considered to some purposes as factors or in the nature of factors; upon the same principle as in other cases, between holders of bills of exchange and acceptors, or the first indorser of bills payable to a man's own order, the truth of the transactions between them has been allowed to be entered into to destroy the *prima facie* consideration of a bill, the supposed value received. But no evidence of want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between such an acceptor or drawer, and a third person holding the bill for value. And the rule is so strict that it will be presumed that he does hold for value until the contrary appears. The *onus probandi* lies on the defendant. If it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by every thing which would affect that first holder. This all proceeds upon an *argumentum ad hominem*: it is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience. In strict law, and with respect to third persons, bankers do not at all

¹ Sayer, 73.

² 1 Salk. 283.

resemble factors; nor will the rule that factors cannot pledge apply to the case of a banker pledging indorsed bills. That rule is grounded on the strict rule of property: the goods are not the factor's, and therefore he cannot pledge them. He may sell them, because, though they are not his, he is intrusted to sell them for his principal. He manages the sale, but it is his principal who through him sells them. For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers, to be got in when due and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him. He may sell because the property has been intrusted to him, and he may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner. Perhaps the confidence reposed in bankers may be abused, and it might be wished that they could be restrained from abusing their trust. But an arbitrary restriction cannot be imposed: any restriction would possibly check the facility of negotiation. As in cases of other property we say *caveat emptor*, so in this particular case we may say to the customer who prefers to entrust his banker with his bills and his cash, rather than to be at the trouble of doing his own business, *caveat*.

*Per Curiam. Rule discharged.*¹

HUNTER, SURVIVING PARTNER OF ALLEN AND OTHERS v.
JEFFERY.

AT GUILDHALL, CORAM LORD KENYON, C. J., JULY 25, 1797.

[*Reported in Peake's Additional Cases*, 146.]

THIS was an action on a bill of exchange, drawn by Livesey, Hargrave, & Co., on the defendant, payable to Richard Harris or order,

¹ *Palmer v. Richards*, 2 L. M. & P. 1; 6 Ex. 63, s. c.; *Bleaden v. Charles*, 7 Bing. 246; *Wookey v. Pole*, 4 B. & Al. 1; *Stat. Assoc. v. Hunt*, 17 Kas. 533; *Chicopee Bank v. Chapin*, 8 Met. 40; *Ayer v. Tilden*, 15 Gray, 178; *N. Y. Bank v. Vanderhorst*, 32 N. Y. 553; *Platt v. Beebe*, 57 N. Y. 339; *Bond v. Wiltse*, 12 Wis. 611; *Lyons v. Ewings*, 17 Wis. 61; *Curtis v. Mohr*, 18 Wis. 615; *Kinney v. Kruse*, 28 Wis. 183, *accord*.

Jenness v. Bean, 10 N. H. 266; *Williams v. Little*, 11 N. H. 66; *Doe v. Burnham*, 31 N. H. 426 (*semble*), *contra*. — ED.

for £1,542 7s., and accepted by the defendant. The bill was dated Manchester, 18th February, 1788. Richard Harris, the nominal payee, being a nonentity, the declaration was in the same form as that in the case of *Minet and Another v. Gibson and Johnson*. The action was brought by the direction of the Lord Chancellor, in consequence of the plaintiff having petitioned for leave to prove this and other bills to the amount, in all, of £9,219 18s. 8d. under a commission of bankruptcy against the defendant; to resist which proof the defendant had sworn that he did not know that the bills were fictitious transactions.

It appeared in evidence that these bills were actually drawn in Manchester, and when drawn, were generally taken to the house of Allen & Co. (who were the first bankers in that place), by a clerk of Livesey & Co., for discount. That the defendant also had large concerns with the house of Livesey & Co. at London, and was in the daily habit of coming there to get bills for the purpose of accommodating himself and that house, and also for the purpose of buying goods of them. That he frequently used to ask for bills, saying he had an opportunity of getting them discounted in the country, and sometimes would have from £1,500 to £2,000 in bills, of a day: these bills were all payable to fictitious persons. The name of Richard Harris was used as often as any other, and some of the bills were payable to fictitious firms. Some were drawn on Gibson & Johnson; some dated at Manchester, and drawn by the house of Livesey & Co. there, on their house in Cheapside. When the bills drawn in London were dated at Manchester, they were antedated two or three days, which was known to the defendant, and the ink not dry when delivered to him. The fictitious indorsement was sometimes made by a clerk in the house of Livesey & Co., and sometimes the bills were delivered to the defendant without any indorsement. The witness did not recollect any bill drawn in London on the defendant being payable to a fictitious payee: they were all payable to Livesey & Co.'s own order. The bills drawn in London, payable to fictitious payees, were drawn on Gibson, and J. Livesey & Co., and other houses. The bills actually drawn in Manchester (of which these were part) were, as before stated, fictitious transactions, and discounted with Allen & Co. as soon as drawn: in exchange, Allen & Co. gave their own bills on Vere & Co., in London, in favor of Livesey's house. It further appeared that Allen, the acting partner of that house, was on a footing of great intimacy and confidence with Livesey & Co., and had given a general order to his clerks to discount all bills coming from them. In doing this, they trusted entirely to the house of Livesey & Co., and did not give any credit to the defendant or the names appearing as indorsers on the bills. This traffic had gotten to such a height that in Livesey's house a book of *fac-similes* was actually kept, from which

the clerks used to take such name for payee as they thought proper, and indorse the name; and, when the necessities of the house were very great, they inserted any name that their imagination could suggest.

LORD KENYON said he hoped this instance of the baneful effects of transactions of this nature would be sufficient to prevent it ever arising at such a height in future; but he could not but lament that the criminal law of the country had not been called in aid of its civil institutions, and that some of those persons who had been guilty of a conduct which had involved hundreds in ruin, had not paid the debt of their offences. The question in this cause is, whether this plaintiff, circumstanced as this case is, has a right to take a part of this bankrupt's effects from those who have undoubtedly a fair claim against them. Generally speaking, the first indorsement of a bill must be proved; but in the former cases of this nature I have held, and the House of Lords, after solemn argument, confirming my opinion, have held, that a person who knows the whole of the transactions and gives color to them, shall not impose an impossible duty on a *bona fide* and fair holder of the bills. It is now, therefore, too well settled to be disputed that a *bona fide* holder may recover on them as on bills payable to bearer. But that is not this case: the plaintiff was a partner in the house of Allen & Co., and civilly he is affected by the act of every partner in the house. It is clear that Allen had notice that these bills were all a fictitious proceeding: they were delivered to that house the day they were drawn, by the persons who were the drawers, and with the names of the indorsers on the back. Some were payable to fictitious firms. Allen & Co. were the first bankers in Manchester: by possibility, names might deceive them, but firms could not; they must know whether any such firms existed in the neighborhood of Manchester. It is now beyond all controversy that fictitious bills were in circulation, and it does not appear even that the defendant ever paid a bill so drawn on him. The house of Allen & Co. did not give credit to him: they trusted entirely to Livesey, Hargrave, & Co.; and, if they knew that these bills were fictitious to serve them, they cannot recover on it.

Verdict for defendant.¹

PARR v. ELIASON AND OTHERS.

IN THE KING'S BENCH, NOVEMBER 24, 1800.

[Reported in 1 East, 92.]

IN trover for a bill of exchange, it appeared that the plaintiff, residing at Liverpool, in 1799 became possessed of the bill in question,

¹ McCall v. Corning, 3 La. An. 409, 414 (*semble*); Maniort v. Roberts, 4 E. D. Sm. 84, *accord*. — ED.

which was drawn by a correspondent in the West Indies upon a house in London, in favor of the plaintiff or his order, and accepted payable on the 27th of July, 1800. The plaintiff having occasion to raise money applied to the house of Persent and Bodeker, on the 18th of June, 1799, to discount the bill, which they agreed to do and took the full discount, stipulating, however, that the plaintiff should in part payment of the money take their acceptance of a bill to be drawn by him on them at three months' date, which was done accordingly; and at the same time the plaintiff indorsed the original bill in question to them. Persent and Bodeker became bankrupts in September, 1799, having first negotiated the bill; and the same was afterwards paid to the defendants, as assignees under their commission, in satisfaction of a debt due to the bankrupts' estate. It also appeared that after the bankruptcy the plaintiff was obliged to take up and pay the bill drawn by him upon the bankrupts and accepted by them. At the trial before Lord Kenyon at Guildhall, it was contended, on the part of the plaintiff, that the indorsement of the bill by him to the bankrupts for an usurious consideration avoided the security by the statute 12 Anne, st. 2, c. 16, whereby all bonds and assurances for "payment of any money to be lent upon usury, &c., shall be void;" which has been holden to avoid securities of this kind even in the hands of innocent indorseees for a valuable consideration without notice. *Lowe v. Waller* and *Bowyer v. Bampton*. But Lord Kenyon was of opinion that the assignees of the bankrupt had a right to protect their possession of the bill by the title of the party from whom they received it in payment, who was an innocent holder; and that the bill, being valid in its inception, the statute of usury did not apply to the present case; and thereupon the plaintiff was nonsuited. A rule having been obtained on a former day in this term, calling on the defendants to show cause why the nonsuit should not be set aside and a new trial had,

Law and *Wood* were now called upon to support the rule. It is clear that the consideration for indorsing the bill, as between the plaintiff and the bankrupts, was usurious; and, if it had come to the hands of the assignees immediately from the bankrupts, their title must have been affected by the usury. But though the defendants may be considered as standing in the situation of innocent holders, yet the instrument itself is avoided by the statute of usury, and no title could be conveyed by the plaintiff's indorsement. The bill being originally made payable to the plaintiff or his order, without his indorsement it was not negotiable, nor was any assurance in law to any other person: then the usurious consideration was contemporaneous with the first existence of the instrument as an assurance to

the bankrupts. Suppose the bill had been drawn by the plaintiff himself payable to his own order, and he had agreed to indorse it for an usurious consideration, it cannot be pretended but that it would have been void by the statute: this then is the same in effect; for every indorsement is as it were a new drawing of the bill;¹ and the assignees, though innocent holders, must in any action upon the bill derive title through the first indorser. If the bankrupts could not have maintained an action against the plaintiff upon his indorsement on account of its being an assurance for an usurious consideration, neither could any subsequent holder, according to the construction put upon the statute. Then it is inconsistent to say that, though no action could be maintained against the first indorser, yet that title may be made through him to another.

Erskine, Gibbs, and Taddy, contra, were stopped by the court.

LORD KENYON, C. J. There is nothing in the point; and it might be attended with serious consequences, if it could be supposed that the court entertained any doubt upon it. The commerce of this country subsists upon paper credit; but, if this action could be maintained, no man would be safe in taking even a Bank of England post-bill payable to order: for however just and legal it might be in its inception, if the payee passed it to another for an usurious consideration, it is now contended that it would be void in the hands of any subsequent innocent holder, and might be recovered from him. Where the bill itself, in its original formation, is given for an usurious consideration, the words of the statute of Anne are peremptory that the assurance shall be void; and the construction which has been put upon the statute has gone far enough in saying that it shall be avoided even in the hands of an innocent indorsee without notice. But no case has gone the length now contended for, nor do the words of the statute require it. Here the bill was fair and legal in its concoction, and therefore no advantage can be taken of what happened afterwards against *bona fide* holders. The defendants stand clothed with the rights of the party from whom they received the bill in payment, and must therefore be taken to be holders for a valuable consideration without notice. I referred at the trial to a case in *Siderfin*,² which is a very leading authority, wherein it is said that, though a conveyance

¹ *Vide* 2 Burr. 674.

² *Prodgers v. Langham*, 1 Sid. 133. See also *Lowther v. Carleton*, Cas. in Eq. temp. Ld. Talbot, 187, where a purchaser for a valuable consideration, but with notice, protected himself by making title through a third person whose title could not be impeached by notice of the prior defect. And several cases in 2 Vern. 159, where purchasers for valuable consideration without notice have protected themselves by getting a legal title, though obtained originally by undue means.

may in its creation be fraudulent and voidable as against a purchaser, yet it may become valid by matter *ex post facto*; and that a person to whom a conveyance was made which was voluntary in its creation, and therefore voidable, might be protected by the title of a subsequent purchaser for a valuable consideration who had acquired an interest in it.

*Per Curiam. Rule discharged.*¹

BARLOW v. BISHOP.

IN THE KING'S BENCH, MAY 8, 1801.

[Reported in 1 East, 432.²]

THIS was an action by the indorsee of a promissory note against the maker, which note was drawn payable to one Ann Parry, or order, at two months after date, for £41 10s., and by her indorsed to the plaintiff. The first count of the declaration was upon the note, to which were added the common money counts. It appeared in evidence before Lord Kenyon, at the trial at the last Middlesex sittings, that Ann Parry was a married woman, carrying on trade at Birmingham in her own name with the consent of her husband; and that the plaintiff, who lived in London, had furnished her with goods to the amount of the note, dealing with her as a *feme sole*. That the plaintiff, after much delay, having pressed for payment, the defendant, with a view to serve Mrs. Parry, gave her the note in question, with knowledge of her being married, and with a view that she should pay it over to the plaintiff, in order to stop his proceeding against her, which she did by indorsing it over to him. A verdict was taken for the plaintiff, with leave to the defendant to move the court to enter a nonsuit, if they should be of opinion that the plaintiff could not recover upon any of the counts.

Gibbs on a former day obtained a rule *nisi* for this purpose, on the ground that, by the delivery of the note to Ann Parry for her use, it became the property of her husband, and she could not pass it away by her own indorsement. And that no consideration having passed for the note between these parties, nor, indeed, any consideration received for it by the defendant, the plaintiff could not recover upon either of the money counts.

Erskine and *Espinasse* now showed cause against the rule; and, admitting that by the delivery of the note to the wife for her use

¹ *Daniel v. Cartony*, 1 Esp. 274; *Foltz v. Mey*, 1 Bay, 486; *King v. Johnson*, 8 McC. 365, *accord.* — Ed.

² 3 Esp. 266, s. c. — Ed.

the property vested in the husband, they contended, first, that as she carried on trade in her own name with her husband's consent, all acts done by her in the course of such trade must be taken to be with the knowledge and consent of her husband; and he having permitted her to indorse the note in question, it in effect became his own indorsement. But, secondly, if the property in the note could not pass by her indorsement, though made with her husband's consent, then as the defendant knew that she was a married woman, and that the object of making the note payable to her was that she might indorse it to the plaintiff, which by law was a nullity, it is the same in legal effect as if the note were either made payable to a fictitious person, in which case it became payable to bearer, as in *Gibson v. Minet*; or as if it were made payable to the plaintiff himself, for whose use it was expressly given. Perhaps too, under the special circumstances of the case, the giving this note may be considered as evidence, under the money counts, of the defendant's having received so much money for the use of the plaintiff in payment of his demand upon Ann Parry; or, as in *Fenner v. Mears*,¹ it amounts to an agreement by the defendant to hold so much money for the use of the person to whom Ann Parry herself should indorse the note.

LORD KENYON, C. J. I saved the point at the trial, not from any doubt entertained by myself, at the time, but to give an opportunity to the plaintiff's counsel to see if there were any ground upon which the action could be sustained; but none has been or can be stated. It is clear that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed, as many acts of this nature may be done by a power of attorney, and the jury might have presumed what was necessary in favor of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it. And this is not like a note payable to the order of a fictitious person to whom no interest can pass; but here the interest passed to the husband. Neither is there any color for saying that the plaintiff can recover upon the money counts. No money passed between these parties. In *Fenner v. Mears*, there was an express agreement to pay the money to any person to whom the bond should be assigned: it does not, therefore, bear upon the present case. *Per Curiam. Rule absolute for entering a nonsuit.*²

¹ 2 Blac. 1269.

² *Binny v. Smith* (Court of Session), Jan. 26, 1836, *accord.* — ED.

DUNCAN v. SCOTT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 17,
1807.

[Reported in 1 Campbell, 100.]

ASSUMPSIT on a foreign bill of exchange, dated Cape François, St. Domingo, 4th December, 1797, drawn by the defendant on J. and E. Gardhener, at Charleston, in North America, for 3,000 Spanish dollars, at six months after date, payable to V. Kein, and indorsed by him to the plaintiff. Plea, *non assumpsit*.¹

Topping contended that the plaintiff must still be nonsuited, as he had not proved himself to be holder of the bill for a valuable consideration. The bill had been drawn by the defendant, when he was under imprisonment; when he was threatened with death and the confiscation of his property; when he was not a free agent, but a mere instrument in the hands of others. He was clearly not liable upon it to those who had extorted it from him; and if it was binding upon him at all, if it was not a complete nullity, it was at least incumbent on those who sued as indorsees of a bill made under such circumstances to show how they came by it; that they are innocent holders, and that they gave full value for it to the indorser.

The Attorney-General maintained that, as the protest proved the bill to have been in the hands of the plaintiff before it became due, it was unnecessary for him to show, in the first instance, what consideration he had given for it, and that it lay on the other side to impeach his title. Had the indorsement taken place after the bill was due, the case would have been otherwise, as the bill would then have come to the plaintiff under circumstances of suspicion; but before a bill is due, full credit is to be given to it, and every one has a right to suppose that the persons whose names appear upon it became parties to it regularly and for a full consideration. Under these circumstances, it was to be presumed that the indorsee gave value for the bill; and the *onus probandi* lay upon the drawer, if he did not. There was no doubt that the plaintiff here had received the bill in payment of goods sold; but he could not anticipate the defence to be set up to the action, and it would materially shake the credit of negotiable securities, if in every case the plaintiff must come prepared at the trial to prove what valuable consideration he gave for them.

¹ Only so much of the case is given as relates to the defence of duress. — ED.

LORD ELLENBOROUGH held that, the defendant not having been a free agent when he drew the bill, it was incumbent on the plaintiff to give some evidence of consideration, and therefore directed a non-suit.¹

BENNETT v. FARNELL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 21, 1807.

[*Reported in 1 Campbell, 180.*]

THIS was an action against the defendant as acceptor of a bill of exchange for £500, dated 25th March, 1805, at two months after date.

The first count of the declaration, in which the plaintiff claimed as indorsee, stated the bill to have been drawn by Robert Abney, payable to the order of the said Robert, by the name and addition of George Abney, Esq., and after being accepted by the defendant to have been indorsed by Robert Abney to the plaintiff. In the second count, the plaintiff claimed as bearer; and having set out the bill as drawn by Robert Abney, payable to George Abney, Esq., or order, and accepted by the defendant, it averred "that, when the said last-mentioned bill of exchange was made, there was no such person as George Abney, the supposed payee named in the bill; but that the said name of George Abney was merely fictitious: by reason whereof the sum of money specified in the said last-mentioned bill of exchange became and was payable to the bearer thereof, according to the effect and meaning of the same bill,"—adding that the plaintiff became bearer of the bill for a good and valuable consideration. There was a third count, in the common form on a bill or note payable to bearer, with the usual money counts. Plea, the general issue.

Park, in opening the case for the plaintiff, stated that the bill was actually made payable on the face of it to George Abney. The drawer had once had a brother of that name, but he had been long dead. Therefore, it was the same as if it had been drawn payable to a fictitious person; and although the indorsement was made by the drawer, Robert Abney, not by George Abney, the supposed payee, yet under the circumstances that was quite sufficient, as upon the authority of the cases of *Tatlock v. Harris*,² *Vere v. Lewis*,³ and *Minet v. Gibson*, a bill payable to a fictitious person is payable to

¹ *Clark v. Pease*, 41 N. H. 414, *accord*.

Willocks v. Callender (Court of Session), Nov. 21, 1776; *Wightman v. Graham*, (Court of Session), Dec. 6, 1787, *contra*.

Conf. Loomis v. Ruck, 56 N. Y. 462. — *Ed*.

² 3 T. R. 174.

³ 3 T. R. 182.

bearer. Thus, it would be enough for the plaintiff to prove that he became bearer of this bill for a good and valuable consideration. But it not only could be proved that he had become so, but letters from the defendant would be read acknowledging this, and praying for further time to pay the bill.

Garrow, for the defendant, said that a case almost the same with that now opened had been decided by Lord Ellenborough himself, at the sittings after Hilary term, 1805. He then read a note of the case of *Were and Others v. Taylor*, which was nearly as follows: "Action on a bill of exchange payable to Watts or order. No such person existed. Erskine, for the plaintiffs, insisted, on the authority of *Tatlock v. Harris*, that this must be taken as payable to bearer. He stated that the produce of the bill had come to the hands of the defendant. Lord Ellenborough said that would be the best case to make for the plaintiffs. But he should hesitate very much before he should hold that this bill could be considered payable to bearer: the very form of the bill was contrary to such a supposition, and the cases on the subject had been much doubted. Accordingly, the plaintiffs failing to show that the produce of the bill had come to the use of the defendant, they were nonsuited."

Park said he understood that in the Court of Common Pleas an action was brought immediately after, on another bill of the same set and framed exactly in the same manner, in which the plaintiff was allowed to recover.

LORD ELLENBOROUGH. Must not that have been under the count for money had and received?

Comyn, amicus curiæ, observed that he had been in the cause alluded to in the Common Pleas, and that his Lordship's conjecture was right; as they had there proved that the defendant had received money for the bill, which had been paid by the plaintiff in discounting it.

LORD ELLENBOROUGH. I will admit any evidence of value having been received by the defendant. If Bennett's money has found its way to him, he shall not be allowed to retain it. In that case, he has money drily in his hands belonging to another person; and it may be recovered from him as money had and received. But the bill being made payable to George Abney or order, the plaintiff cannot sue upon it, either as the mere bearer or as indorsee of Robert Abney. Where a bill is payable to the order of a particular person, an order from this person must be shown by any one who would make title to the bill.¹

Plaintiff nonsuited.

¹ "In *Bennett v. Farnell*, the doctrine I have supposed to have been held, that 'a bill of exchange made payable to a fictitious person, or his order, is neither in effect payable to the order of the drawer nor to bearer,' must be taken with this

WILLIAMSON v. WATTS, SPINSTER.

AT NISI PRIUS, CORAM SIR JAMES MANSFIELD, C. J., DECEMBER 13, 1808.

[Reported in 1 Campbell, 552.]

ASSUMPSIT on a bill of exchange. Plea, infancy. Replication, that the bill was accepted for necessities, and issue thereupon. When the case was opened,

SIR JAMES MANSFIELD, C. J., said: This action certainly cannot be maintained. The defendant is allowed to be an infant; and did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to. As the point of law is so clear, I am strongly inclined to nonsuit the plaintiff. However, if I am required to hear the evidence, I will do so; and the defendant will find redress in the court above, should the verdict be against her.

It appeared that the defendant was a woman of the town, and that the consideration for the acceptance was the sale of silk stockings and other expensive articles of dress. Whereupon

SIR JAMES MANSFIELD directed a nonsuit.¹

qualification, 'unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor.' A new trial was refused in this case, because no such evidence had been offered at *nisi prius*. Lord Ellenborough said he conceived himself bound by *Minet v. Gibson*, and the other cases upon this subject which had been carried up to the House of Lords (though by no means disposed to give them any extension), and that if it had appeared that the defendant knew George Abney, the payee, to be a fictitious person, he should have directed the jury to find for the plaintiff." 1 Camp. 180, c.

See *Maniort v. Roberts*, 4 E. D. Sm. 83. — Ed.

¹ *Trueman v. Hirst*, 1 T. R. 40; *McCrillis v. How*, 3 N. H. 348; *Conn v. Coburn*, 7 N. H. 368; *Fenton v. White*, 1 South. 100; *Swasey v. Vanderheyden*, 10 Johns. 33; *Henderson v. Fox*, 5 Ind. 489; *Rundel v. Keeler*, 7 Watts, 237 (*semble*); *Bouchell v. Clary*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9, *accord*.

Earle v. Reed, 10 Met. 387; *Dubose v. Wheddon*, 4 McC. 221; *Haine v. Tarrant*, 2 Hill (S. Ca.) 400; *Bradley v. Pratt*, 23 Vt. 378, *contra*.

An infant's bill or note is, like his other express contracts, not void, but voidable at his election. Consequently, a ratification by the infant after he attains his majority renders the bill or note valid *ab initio*.

Hunt v. Massey, 5 B. & Ad. 902; *Fisher v. Jewett*, Berton (N. B.), 23; *Dockery v. Day*, 7 Port. 518 (*semble*); *Lawson v. Lovejoy*, 8 Greenl. 405; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Martin v. Mayo*, 10 Mass. 137; *Whitney v. Dutch*, 14 Mass. 457; *Reed v. Batchelder*, 1 Met. 559; *Wright v. Steele*, 2 N. H. 51; *Orvis v. Kimball*, 3 N. H. 314; *Edgerly v. Shaw*, 25 N. H. 514; *Goodsell v. Myers*, 3 Wend. 479 (*semble*); *Everson v. Carpenter*, 17 Wend. 419; *Bigelow v. Grannis*, 2 Hill, 120; *Taft v. Sergeant*, 18 Barb. 320; *Bay v. Gunn*, 1 Den. 108; *Henry v. Root*, 33 N. Y. 526, 543 (*semble*); *Cheshire v. Barrett*, 4 McC. 241; *Bobo v. Hansell*, 2 Bail. 114; *Little v. Duncan*, 9 Rich. 55. — Ed.

POTTER v. TUBB.

AT NISI PRIUS, SARUM LENT ASSIZES, CORAM BULLER, J., 1785.

[Reported in 1 Chitty, Jr., 430.]

WHEN, in an action by the payee of a bill of exchange against the acceptor, the defence attempted to be set up was that the consideration of accepting the bill was a debt due by the acceptor to the drawer for smuggled goods, it was ruled by BULLER, J., that this could not affect the plaintiff, unless the bill had been given to him for a smuggling debt.¹

¹ The doctrine of the principal case, that the title of an innocent holder for value cannot be impeached by any illegality in the transaction between prior parties to a bill or note, except in cases where the statute expressly makes the instrument absolutely void (*supra*, pp. 400 n. 2, 416 n. 2), has been universally followed, *e. g.* : —

BILL OR NOTE EXECUTED ON SUNDAY. *Saltmarsh v. Tuthill*, 13 Ala. 390, 406 (*semble*); *Trieber v. Comm. Bank*, 31 Ark. 128; *Cumberland Bank v. Mayberry*, 48 Me. 198; *Cranson v. Goss*, 107 Mass. 439; *Vinton v. Peck*, 14 Mich. 287; *State Bank v. Thompson*, 42 N. H. 369; *Knox v. Clifford*, 38 Wis. 651; *Houlston v. Parsons*, 9 Up. Can. Q. B. 681; *Crombie v. Overholtzer*, 9 Up. Can. 55.

BILL OR NOTE GIVEN FOR INTOXICATING LIQUORS. *Cazet v. Field*, 9 Gray, 329; *Taylor v. Page*, 6 All. 86; *Norris v. Langley*, 19 N. H. 423; *Doe v. Burnham*, 31 N. H. 426; *Great Falls Bank v. Farmington*, 41 N. H. 32; *Pindar v. Barlow*, 31 Vt. 529; *Converse v. Foster*, 32 Vt. 828; *Johnson v. Meeker*, 1 Wis. 436.

OTHER INSTANCES OF ILLEGALITY. *Lucas v. Winton*, 2 Camp. 443; *Simpson v. Pogson*, 3 Dowl. & Ry. 567; *Kay v. Masters*, 2 Leg. Obs. 396; *Goldsmid v. Hampton*, 5 C. B. N. s. 94; *Greenland v. Dyer*, 2 M. & Ry. 422; *Hatch v. Burroughs*, 1 Woods, 429; *Bozeman v. Allen*, 48 Ala. 512; *Haight v. Joyce*, 2 Cal. 64; *Thorne v. Yontz*, 4 Cal. 321; *Adams v. Wooldridge*, 4 Ill. 255; *Conkling v. Underhill*, 4 Ill. 388; *Hemenway v. Cropsey*, 37 Ill. 357; *Williams v. Cheney*, 3 Gray, 215; *Young v. Berkley*, 2 N. H. 410; *Williams v. Little*, 11 N. H. 66; *Clark v. Ricker*, 14 N. H. 44; *Clark v. Pease*, 41 N. H. 414; *Baker v. Arnold*, 3 Cal. 279; *Willmarth v. Crawford*, 10 Wend. 341; *City Bank v. Barnard*, 1 Hall, 70; *Gould v. Armstrong*, 2 Hall, 266; *Rockwell v. Charles*, 2 Hill, 499; *Loomis v. Cline*, 4 Barb. 453; *Hill v. Northrup*, 4 Th. & C. 120; 1 Hun, 612, s. c.; *Grimes v. Hillenbrand*, 6 Th. & C. 620; 4 Hun, 354, s. c.; *Bell v. Wood*, 1 Bay, 249; *Pendar v. Kelley*, 48 Vt. 27; *Streit v. Waugh*, 48 Vt. 298.

FAILURE OF CONSIDERATION between prior parties is of course not available as a defence against an innocent holder for value. *Robinson v. Reynolds*, 2 Q. B. 196; *Munroe v. Bordier*, 8 C. B. 862; *U. S. v. Bank of Metropolis*, 15 Pet. 393; *Woods v. Hynes*, 2 Ill. 103; *Mulford v. Shepard*, 2 Ill. 583; *Conkling v. Vail*, 31 Ill. 166; *Baldwin v. Killian*, 63 Ill. 550; *Petillon v. Noble*, 73 Ill. 567; *Culver v. Hide Bank*, 78 Ill. 625; *Merrick v. Phillips*, 58 Mo. 436; *Perkins v. Challis*, 1 N. H. 254; *Watson v. Flanagan*, 14 Tex. 354.

FRAUDULENT REPRESENTATIONS by which one is induced to execute a bill or note stand upon the same footing with illegality, or failure of consideration. *Corrie v. Aitken* (Court of Session), July 27, 1785; *Plumber v. Houston* (Court of Session), Feb. 13, 1706; *Middletown Bank v. Jerome*, 18 Conn. 443; *Humphrey v. Clark*, 27 Conn. 381; *Gridley v. Bane*, 57 Ill. 529; *Loomis v. Metcalf*, 30 Iowa, 382; *Richardson v. Brackett*, 101 Mass. 497; *Miller v. Finley*, 26 Mich. 249; *McWilliams v. Mason*, 31 N. Y. 294; *How v. Potter*, 61 Barb. 356. — ED.

BURBRIDGE v. MANNERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., FEBRUARY 25,
1812.

[*Reported in 3 Campbell, 193.*]

THIS was an action on a promissory note for £10 15s. 5*d.*, dated 11th October, 1810, drawn by J. Finney, payable three months after date at Fraser & Co.'s to the defendant, indorsed by him to one Tinson, and by Tinson to the plaintiff.

The note was regularly presented for payment in the forenoon of the day it became due, when payment was refused; and in the afternoon of the same day the plaintiff caused notice of its dishonor to be sent to the defendant.

Park, for the defendant, objected that this was not sufficient notice of the dishonor. Finney, the maker of the note, had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonored. The notice therefore stated what was untrue, and was evidently premature,

LORD ELLENBOROUGH. I think the note was dishonored as soon as the maker had refused payment on the day when it became due, and the notices sent the defendant must have answered all the purposes for which notice in such cases is required. The holder of a bill or note gives notice of its dishonor in reasonable time the day after it is due; but he may give such notice as soon as it has been dishonored the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information.

By the defendant's evidence, it appeared that this bill, being in the hands of Maude & Co., was paid in by them when indorsed only by the defendant to their bankers, Masterman & Co., who were to present it for payment. Maude & Co. had received it from Finney the maker, as a collateral security for an acceptance of his, then in their hands overdue. On the 10th of January, four days before the note was due, some person unknown came to Masterman & Co.'s where it lay, paid it, and carried it away without its being cancelled, or any memorandum being made upon it. However, it had been indorsed by Tinson, and had come into the hands of the plaintiff, before it was due.

Park contended that, after the bill had been once paid, it could not be reissued, and he relied upon *Beck v. Robley*.

LORD ELLENBOROUGH. Payment means payment in due course, and not by anticipation. Had the bill been due before it came into the

plaintiff's hands, he must have taken it with all its infirmities. In that case, it would have been his business to inquire minutely into its origin and history. But, receiving it before it was due, there was nothing to awaken his suspicion. I agree that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid; but, if they do not, the holders of such securities cannot be affected by any payment made before they are due. While a bill of exchange is running, it remains in a negotiable state. I cannot limit its negotiability to the last four days before it becomes due more than the first four days after it is drawn.

*Verdict for the plaintiff.*¹

BASS v. CLIVE.

IN THE KING'S BENCH, APRIL 13, 1815.

[*Reported in 4 Maule & Selwyn, 13.*]

ASSUMPSIT by the plaintiffs as indorsees, against the defendant as acceptor of the following bill of exchange:—

“LONDON, Feb. 25, 1814.

“£380.

“Three months after date, pay to our order £380, value received.

“ELLIS, NEEDHAM, JR., & Co.

“To Mr. T. CLIVE.”

And the plaintiffs declared as upon a bill drawn by certain persons trading under the name, style, and firm of Ellis, Needham, Jr., & Co., payable to their own, to wit, the order of the said Ellis, Needham, Jr., & Co., and indorsed, &c. And at the trial before Lord Ellenborough, C. J., at the London sittings after last Michaelmas term, because it was proved that only one person constituted the firm of Ellis, Needham, Jr., & Co., therefore it was objected that here was a variance. His Lordship directed a nonsuit, but gave the plaintiffs

¹ *Palmer v. Marshall*, 60 Ill. 289; *White v. Kibling*, 11 Johns. 128 (*semble*); *Runyan v. Reed*, 5 Pa. L. J. 439, *accord*. — ED.

liberty to move.¹ Topping accordingly, in the last term, obtained a rule *nisi* for a new trial.

E. Lawes, who showed cause, admitted that the bill imported *prima facie* to be drawn by a firm consisting of more than one person, yet, he said, as the plaintiffs received it from Needham, Jr., the drawer, they must be intended to know that he alone was concerned in the drawing it. And doubtless they might have declared as upon a bill drawn by him, though the bill purport to be drawn by a firm comprising more persons than one. If, therefore, the plaintiffs might have averred and proved contrary to the fact apparent on the face of the bill, the defendant shall not be estopped from doing the same.

LORD ELLENBOROUGH. Is not the acceptor, before he accepts a bill drawn upon him in the name of an aggregate firm, bound to know whether the firm consists of a plurality of persons or not; and, if he does accept the bill, is he not estopped from averring that it is not in fact drawn by an aggregate firm, when he himself has accredited the description by accepting it when so drawn? It struck me at the trial that the plaintiffs should have framed their declaration as if the bill was drawn by an individual in the name of an aggregate firm; but, as it is, they have declared according to the terms in which the defendant has accepted the bill. The words "pay to our order" naturally import a plurality of persons; and the plaintiffs would have violated the letter, if they had described it as drawn in the singular. Besides, the defendant has, by his acceptance, led them into the error; and how can the indorsees of a bill be supposed to have any knowledge of the firm of the drawers beyond that which the bill conveys to them? A person who takes a bill is warranted in taking it according to the ordinary import of its terms, and treating it so; and it would introduce vast inconvenience, if it were otherwise, and if the party declaring must never venture to predicate either the singular or plural, though the terms of the bill clearly import it. The point was saved at the trial upon the impression which I then had, but I now think my present view of it the more correct one.

LE BLANC, J. The bill being drawn in the plural, "to our order," satisfies the mode of declaring upon it.

BAYLEY, J. Possibly the plaintiffs might have declared according to the fact as it exists; but they may also declare according to the fact as the defendant says it exists. The defendant, by his acceptance, has said, there is a firm of Ellis, Needham, Jr., & Co., and that to their order he will pay it. He is precluded from saying that the word "our" is not well applied: after having recognized the firm in the plural, he is not now at liberty to deny it.

¹ See 4 Campb. N. P. C. 78.

DAMPIER, J. Suppose the drawer's name is forged, yet, if the drawee accept the bill, he is precluded from averring as against strangers that it is a forgery. So here the defendant, by his acceptance, has verified the word "our."

*Rule absolute.*¹

DUNN AND ANOTHER v. O'KEEFE.

IN THE KING'S BENCH, JUNE 28, 1816.

[Reported in 5 Maule & Selwyn, 282.]

ERROR to reverse a judgment given for the plaintiff, Mary O'Keefe, against the defendants, J. and T. Dunn, in an action brought in the Common Pleas, in which the plaintiff declared that the defendants, on the 19th June, 1813, at London, according to the custom of merchants, made their bill of exchange, bearing date the same day, directed to Messrs. Ricketts, Thorne, George, & Co., and thereby required them, one month after date, to pay to the order of J. Sinclair £1,000, for value received; and that Sinclair, afterwards, and before payment of the money in the bill mentioned, or of any part, to wit, on the same day, by his indorsement, appointed the contents of the bill to be paid to the plaintiff, and delivered the same, so indorsed, to the plaintiff; and the plaintiff averred that afterwards, to wit, on the 13th July in the same year, the bill was presented to Messrs. Ricketts for acceptance, and that they refused to accept; of which the defendants afterwards, to wit, on the same day, had notice. By reason of which, according to the said custom, they became liable, &c.

The defendants pleaded *non assumpserunt*; and further, in bar of the action, that before the supposed indorsement of the bill to the plaintiff, and its presentment for acceptance, as in the declaration mentioned, to wit, on the 20th of June, at London, the bill was presented by Sinclair to Messrs. Ricketts for acceptance, and that they refused acceptance, and that notice of such refusal was not given to the defendants. The plaintiff, in reply, protesting that the plea and the matters thereof were insufficient to bar the action, traversed that before the presentment mentioned in the declaration the bill was presented by Sinclair, and refused acceptance, as in the plea alleged.

And, at the trial, the jury found for the plaintiff, upon the *non assumpsit*; and upon the plea they found for the defendants, specially that, before the presentment mentioned in the declaration, the bill was

¹ Clafin v. Griffin, 8 Bosw. 689, *accord.* — Ed.

presented by Sinclair to Messrs. Ricketts for acceptance, and that they refused to accept in the manner stated in the plea; and in case the court should give judgment for the plaintiff, notwithstanding the finding on the plea, the jury assessed the damages at £1,087. Afterwards judgment was entered as follows: "Therefore, it is considered that, notwithstanding the verdict in form aforesaid, found for the defendants, upon the issue joined between the parties upon the plea of the defendants by them secondly above pleaded in bar, the plaintiff recover against the defendants her damages upon the said count, by the jury in form aforesaid assessed," &c.

And the errors assigned upon this judgment were that the defendants' plea was sufficient to bar the action; and, therefore, judgment ought to have been given for them, upon the issue and verdict thereon; and the common error was assigned upon the judgment given for the plaintiff, upon the promise in the said count.

And the point now insisted on for the plaintiffs in error was this, that Sinclair having, by his laches in omitting to give notice of the non-acceptance of the bill, discharged them from their liability, could not, by his subsequent indorsement to the defendant in error revive that liability.

Which point was maintained by *Gifford*, for the plaintiffs in error, who argued, first, upon a consideration of the mutual engagements between the drawer and the holder of a bill of exchange. The drawer, he said, undertakes that the drawee shall accept the bill, and shall also pay it at the period of its maturity: upon failure of either of which conditions, the drawer becomes liable, provided he has due notice. The holder, on the other hand, undertakes for due diligence in seeking payment, and giving notice of any disappointment which may happen in the pursuit of it. It is indeed optional with the holder, where the bill is payable after date, to present it for acceptance, or to wait until the bill arrives at maturity, relying in the interval on the credit of the drawer, and present it at once for payment; but if he elect the former course, and acceptance is refused, he is as much bound to give notice of this refusal as he would be to give notice of non-payment, if he wait till the bill becomes due, and payment is refused. *Blesard v. Hirst*, *Goodall v. Dolley*, *Roscow v. Hardy*. The reason of which has already, in part, been stated; viz., because, immediately on failure of the drawee to accept, the drawer or indorser becomes liable, *Ballingalls v. Gloster*; whence it follows that the drawer ought to have an opportunity forthwith of withdrawing his effects out of the hands of the drawee. Thus, the mutual engagements between the drawer and holder of a bill of exchange requiring notice, the law has adopted the rule, and discharges the drawer if

notice be not given ; and it would be converting the rule of law into a dead letter, if the party violating it may, after the drawer is discharged, cure his own default, and by indorsing over the bill revive the drawer's responsibility. It appears, however, that Lord Ellenborough thought differently of the rule of law, and of the means of evading it, when he pronounced that, "if the indorsers be once discharged by the laches of the holder at the time, in not giving due notice of the dishonor, their responsibility cannot be revived by the shifting of the bill into other hands." *Roscow v. Hardy*. If this were a question on whom the hardship ought to fall, it might be enough to state that, on the one hand, the drawers are concerned, who have already suffered by want of notice, and were not privy to the subsequent indorsement ; on the other, the indorsee, who derives her title immediately by indorsement from the transgressing party (and how could he confer a better title than he had himself ?), and who, by taking the bill unaccepted, must have done it upon the faith reposed in the party indorsing it, that he had done no act to discharge the security. The hardship, therefore, if there be any, ought to fall where the confidence was misplaced, and where the remedy lies immediately against the party who has abused it. As to any supposed inconvenience likely to result from the adoption of these arguments, it may be doubtful how far the unrestrained circulation of unaccepted bills ought to be placed to the account of public convenience, if under that term is comprehended a due regard to individual security. But, however this may be, it is submitted, in the language of the learned judge who dissented in the Common Pleas, "That as the law limits the responsibility of parties to bills of exchange, by certain rules for the negotiation of them, those rules ought not to be varied by the introduction of new and unnecessary distinctions or exceptions."

Tindal, contra, was stopped by the court.

LORD ELLENBOROUGH, C. J. At a very late period, after the law-merchant, as it regards the subject of bills of exchange, had obtained for many centuries, the cases of *Blesard v. Hirst* and *Goodall v. Dolley* were decided. I do not mean to insinuate any thing against the authority of those decisions. They establish this, that, if the party holding a bill of exchange receive notice of its dishonor, he is bound to communicate this to the drawer. But it has not yet been determined that the want of notice operates further than a personal discharge of the drawer, as against the party failing to give the necessary notice, nor that an innocent indorsee shall be barred of his action by any latent defect in the transfer or concoction of the bill, except in the two cases of the bill being given on a gaming or usurious consideration. The inconvenience of a more extended doctrine must be

apparent: for suppose the holder to be the eleventh person into whose hands an unaccepted bill has passed, in succession, by indorsement; the bill arrives at maturity, and is presented, in due course, for payment, and payment is refused, and notice is given to the drawer. According to the doctrine of to-day, the holder is not in a condition to maintain his action, unless he can steer clear of any vice which the bill may have acquired, by having been tendered for acceptance by some one of the numerous holders through whose hands it has passed. A long inquiry must be instituted through the whole series of indorsees, in order to ascertain if any previous presentment was made, and in what manner it was dealt with. Would it be possible to conduct the negotiation of bills of exchange if all this investigation were necessary? What means has the holder of gaining this information? Must it be obtained by private inquiry? That, as it seems to me, would tend to cast about bills of exchange a precarious character that would affect their credit, and perhaps totally exclude them from circulation. The cases of *Blesard v. Hirst* and *Goodall v. Dolley* decided that the indorser should be discharged, but that was as between the indorser and the party guilty of laches, which the plaintiff, in both those cases, was. It may be material to give the drawer notice, in order to enable him to withdraw his effects. This, therefore, may form a sound exception as against the party guilty of laches, but it is a very different consideration whether it shall vitiate the bill in the hands of an innocent indorsee, like the cases of usury or gaming. It is argued that the drawer is only conditionally liable, if the bill be dishonored by non-acceptance or non-payment, provided he has notice. But it is no part of the condition that he shall be discharged *quoad* every holder, if the dishonor be not within the knowledge of the holder. Such a position, I believe, is not laid down in any case, and would, as it seems to me, be carrying the doctrine further than is necessary or convenient, involving, perhaps, the negotiation of bills of exchange in precarious uncertainty. The drawer who issues his bill into the world, without procuring its acceptance, is not without some degree of blame. He issues it in an imperfect state, and cannot justly complain of the neglect of any indorsee who takes the bill in this state, being cognizant of no circumstances to vitiate it, and looking merely at the names upon it. Upon the whole, it appears to me that no authority has pronounced that a bill of exchange shall be a void security, in the hands of an innocent indorsee, who has no knowledge that the bill has ever been dishonored, because a former holder has omitted to give notice to the drawer that the drawee has refused acceptance; and that such a doctrine would be destructive of the very policy and effect

of this species of instrument, by rendering its credit of so precarious a nature that no person would be found willing to trust to it, especially if a number of names were indorsed upon it.

BAYLEY, J. I am of the same opinion. Bills of exchange being negotiable instruments, a different rule applies to them from that which governs ordinary instruments; so that an indorsee, *bona fide* and for a valuable consideration, may possibly stand in a better situation than the indorser. Usury and gaming form two exceptions to this, both affecting an innocent indorsee; and there is one other, where the indorsee cannot be said to be an innocent party, that is, where he takes a bill over-due, or where the bill bears on the face of it the mark of having been dishonored, as if it be noted for non-acceptance. In all other cases, although the want of notice may be a good defence, as against the indorser, it affords none as against an innocent indorsee. The drawer might avoid all difficulty, by drawing the bill payable to his own order, and procuring an acceptance before issuing it. If he draw it payable to a third person, and issue it in its unaccepted state, the imperfection lies at his door, and he must take the consequence. The question being whether the loss shall fall on him or upon an innocent indorsee, it seems to me that the law casts it where it ought to fall. It is argued that there is no hardship in casting the loss on the indorsee, because he received the bill on the individual credit of the indorser; but that argument, I think, is not supported by the premises, because an indorsee takes a bill, not upon the credit of the indorser alone, but of all the names which appear upon the bill.

ABBOTT, J. I confess it always appeared to me to be an anomaly that the holder of a bill of exchange should not be bound to present it for acceptance, and yet, if he does present it, and acceptance is refused, that he should be bound to give notice to the drawer, under pain of having him discharged. To extend, however, the doctrine of discharge to a case like the present, would, in my opinion, be attended with very injurious consequences, as it would almost destroy the negotiation of instruments of this nature; for no prudent person would take a bill of exchange, if it were to be subject, in his hands, to all such latent defects as the present. I am of opinion, therefore, that we ought not to extend the doctrine beyond the authorities cited.

HOLROYD, J. I am of the same opinion, that there ought to be judgment for the defendant in error. This conclusion, I think, follows from some of the principles laid down in argument on the other side. I agree in the position that the drawer undertakes that the drawee shall accept and pay. If the holder tender the bill for acceptance, and acceptance is refused, he knows that the drawer is thereby de-

feated in his expectation: therefore, it becomes his duty to give notice to the drawer, and, if he neglect this, he is guilty of laches, and ought to suffer for his negligence rather than the drawer. This was the ground on which the case of *Blesard v. Hirst* was determined. But such is not the present case, where the bill, in its unaccepted state, has passed into the hands of a *bona fide* indorsee to whom no laches is imputable. Upon the principle already laid down, the drawer, in such a case, holds out to the indorsee that the bill will be accepted and paid; and, if this fails, ought he not to suffer rather than the indorsee, who hath no knowledge whatever that the bill has been dishonored? The case of *Roscow v. Hardy* differs from this, because there the plaintiff took up the bill of his own wrong, after the holder by his laches had discharged the drawer and prior indorsers, and therefore it was properly holden that the plaintiff could not recover against a prior indorser. The greater part of the learned counsel's argument would apply to the case of a stolen bill, where the felon has indorsed it to a *bona fide* holder; but what says the law in such case? Not that the indorsee takes the bill on the individual credit of the felon, so that he must stand or fall by the felon's title, but that he shall recover on his own title, seeing that he might take the bill on the credit of all the names which appear on the bill. Usury and gaming considerations render the bill void in its original formation. I remember the case of *Lowe v. Waller*, where the court reluctantly yielded to that doctrine. This is not the case of a void bill: the indorsee is chargeable with no negligence, and I therefore think that the drawer is still liable.

*Judgment affirmed.*¹

LOWES AND OTHERS v. MAZZAREDO AND OTHERS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1816.

[Reported in 1 Starkie, 385.]

THIS was an action by the plaintiffs, as the indorsees against the defendants, as the acceptors of a bill of exchange, dated 28th March, 1814, drawn by G. Lowes on the defendants, for the sum of £1,000, payable two months after date, to his own order, indorsed by G. Lowes to Sir M. Bloxham, by the latter to Ambrose, and by Ambrose to the plaintiffs.

The defence was, usury committed upon the indorsement of the bill, by G. Lowes to Sir M. Bloxham, and by the plaintiffs, on taking the bill by indorsement from Ambrose.

¹ Conf. *Bartlett v. Benson*, 14 M. & W. 733. — Ed.

It appeared that G. Lowes, on the 1st of April, took the bill to Sir M. Bloxham to get it discounted, and that the latter agreed to do it, on receiving one half per cent commission, and 5 per cent as loss incurred by selling out stock. G. Lowes acceded to these terms, and the bill was indorsed at the time of the transaction. It also appeared that the plaintiffs, upon the indorsement to them, had received one-fourth per cent besides commission as brokers: this, however, it was contended, was divided between the plaintiffs, who were brokers at Liverpool, and their London agents; and was no more than an adequate remuneration for the expenses of carriage, &c.

LORD ELLENBOROUGH was of opinion that the plaintiffs were not entitled to recover on the bill, since they were obliged to claim through an indorsement which had been vitiated by usury; but, upon the counsel for the plaintiffs insisting strongly on the case of *Parr v. Eliason*, his Lordship permitted the plaintiffs to take a verdict, subject to a motion to enter a nonsuit.

A rule *nisi* having been obtained to that effect in the ensuing term, *Scarlett* and *Littledale* afterwards showed cause against it. They relied mainly on the case of *Parr v. Eliason*, and upon the doctrine there expounded by Lord Kenyon. They argued that although the statute avoided the indorsement to Sir M. Bloxham, on the ground of usury, yet that it did not wholly nullify the indorsement to the exclusion of the claim of an innocent holder. That every subsequent holder was in privity with an indorsement once made, and might claim immediately from the indorser. The property on the indorsement by G. Lowes resided in some one; and, if it did not pass to Bloxham, it remained in G. Lowes, and he might have brought his action upon it, or by indorsement have transferred his interest in the bill. Suppose then that he had taken the bill back from Sir M. B., might he not have put it into the hands of another, and so have transferred the interest which he had? But if he could, then in the present case the interest had been transferred, since the holder is in privity with the first indorser, and the intermediate transaction is immaterial. The case of *Daniel v. Cartony*¹ was also cited, to show that, where the bill is good in its inception, an intermediate usurious transaction will not prevent an innocent holder from recovering; and it was urged that the court would not be willing to extend the doctrine expounded in *Lowe v. Waller*, which was contrary to previous decisions on the subject. And that as to the percentage taken by the plaintiffs, it was no more than an adequate remuneration for the expenses of carriage, &c., and that at all events it was a question for the jury whether the transaction was usurious.

¹ 1 Esp. 274.

But the COURT were of opinion that the case of *Parr v. Eliason* was distinguishable from this, and might be supported upon other grounds,¹ and that the indorsement was entirely avoided by the Statute of Usury, and could not be dismissed for one purpose and retained for another; and that after the case of *Lowe v. Waller* had been acted upon so long, its foundation could not now be inquired into. The court were also of opinion that the indorsement to the plaintiffs was also infected with usury; and the rule for entering a nonsuit was made absolute.

ROBINSON v. YARROW.

IN THE COMMON PLEAS, MAY 12, 1817.

[Reported in 7 Taunton, 455.]

ABRAHAM HENRY had been a partner of Charles Staeben, under the firm of Staeben & Co., but they had dissolved that partnership; after which, Henry drew a bill on the defendant at two months' date, payable to "our order," which he signed *P. pro* C. Staeben & Co., A. Henry, and indorsed it to the plaintiff in like manner, by the signature *P. pro* Chas. Staeben & Co., A. Henry. The defendant accepted the bill; and in this, which was an action against him for non-payment, the plaintiff in his first count declared on the bill as drawn by Abraham Henry, using the name, style, and firm of Chas. Staeben & Co., and

¹ According to the report of *Lowes v. Mazzaredo*, in Comyn's Usury, 175, 181, Lord Ellenborough is said to have stated "that he had turned the case of *Parr v. Eliason* in his mind with great doubt; and that, having been of counsel in that case, he remembered that at the time of its decision there was great conflict of opinion upon the subject. That, however, was an action of trover; and the holder of the bill would be entitled to the beneficial consequences arising out of the paper, to recover which trover was the proper form of action."

Mr. Justice Bayley added "that, as every indorsement was considered in law as a new drawing, the plaintiffs must necessarily claim under this new drawing, which was usurious."

This decision was followed in *Chapman v. Black*, 2 B. & Al. 588, in which case Abbott, C. J., who delivered the judgment of the court, remarked, p. 590: "The case of *Lowes v. Mazzaredo* being subsequent to *Parr v. Eliason* and *Daniel v. Cartony*, both of which were there cited, must, in our opinion, be taken as furnishing the rule of law upon this subject." This rule of law was, however, soon changed by the Statute 58 Geo. III. c. 93, which enacted in substance that an innocent holder for value should not be affected by usury in the inception or transfer of a bill or note. — Ed.

averred an indorsement by Henry, not noticing therein that he indorsed by procuration. In the second count, the plaintiff averred that the bill was drawn by A. Henry, and indorsed by A. Henry, not noticing the procuration. In a third count, the plaintiff alleged that certain persons using the style of Chas. Staeben & Co. drew the bill, and that the said Chas. Staeben & Co. indorsed the bill. Upon the trial of the cause at Guildhall, at the sittings after Hilary term, 1817, before Burrough, J., these facts were proved, except that no evidence was given of the handwriting of the indorsement by Henry. Under the direction of Burrough, J., a verdict passed for the defendant.

Vaughan, Serjt., had obtained a rule *nisi* to set aside this verdict and have a new trial.

Best, Serjt., showed cause against the rule. He first contended that none of the counts truly described the bill. Next he objected that the plaintiff had not proved the procuration of Staeben & Co. to have been given to Henry to indorse; so far from its being proved, there were strong indications that the name was fraudulently, if not feloniously, assumed by Henry. But though it has been held that an acceptance admits the drawer's handwriting, and every thing else that is on the face of the bill, and must have been there when the drawee accepted, yet the acceptance does not admit those things which are on the back of the bill, and may or may not have been added after the acceptance.

Vaughan, in support of his rule. It is sufficient to describe the bill in the declaration either according to its legal effect or according to the tenor. *Bass v. Clive*. Therefore, the third count is good, which states that certain persons using the firm of Staeben & Co. drew the bill, though only one person, Henry, in fact drew it. It is admitted that the acceptance proves the authority of Henry to use the name of Staeben & Co. to draw the bill. If the acceptance has proved that fact for one purpose, it has proved it for all the purposes of this bill. If Henry was authorized to draw, it is not too much for a jury to infer that he had a continuing authority to indorse. *Bass v. Clive* goes further than this. Lord Ellenborough, C. J., says, "Is not the acceptor, before he accepts a bill, bound to know whether the drawer is an aggregate firm or not?" The authority, being proved to be once given, must be presumed to continue, unless the contrary be proved.

GIBBS, C. J. I cannot tell what private connection may subsist between these parties. I can look only to the instrument itself, and the manner in which it is declared on. Staeben & Co., who were once a firm, purport to authorize Henry to draw on the defendant. The defendant accepts the bill, and thereby admits that Staeben & Co. are

existing, as they may be, as to him: he stands answerable to Staeben & Co. for paying to them the amount of that bill; he admits that Henry, as the attorney of Staeben & Co., had authority to draw that bill; but it does not appear at what date the indorsement was made, and the defendant has not admitted that Henry had a right to indorse that bill. The defendant may say, I did suppose that Staeben & Co. were an existing house, as they once were, and that they had authorized Henry to draw that bill, and I have made myself liable to them; but I have not admitted that the agent was authorized to indorse the bill.

DALLAS, J. I am of the same opinion with respect to a conversation which was dwelt on in the argument: the defendant admitted that he was liable to the person entitled to recover on that bill, but he did not say who that person was. The plaintiff is not, therefore, entitled to recover.

PARK, J. The mere acceptance proves the drawing, but it never proves the indorsement. It is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration: the first is a power to get funds into the agent's hands, the other to pay them out. The case of *Smith v. Chester* decides that, even if the indorsement be there, the acceptance does not admit the indorser's handwriting, and that the acceptor is bound to look only to the face of the bill. I therefore agree with my Lord and my brother Dallas that my brother Burrough was right in directing this verdict.

*Rule discharged.*¹

DRAYTON AND ANOTHER v. DALE.

IN THE KING'S BENCH, NOVEMBER 14, 1823.

[*Reported in 2 Barnewall & Cresswell, 293.*]

ASSUMPSIT by the plaintiffs, as indorsees against the defendant, as the maker of a promissory note, dated the 22d of September, 1818, for £50, for value received, payable twenty-four months after date, to one Gauntlett Clarke, or his order, and by the said G. Clarke indorsed to Messrs. Knight & Freeman, and by them indorsed to the plaintiffs. Plea: first, general issue; and, secondly, the bankruptcy of the said G. Clarke and one G. Whitehead the younger, by virtue of a commission of bankrupt dated and issued the 19th November, 1814, and an assignment thereupon by the commissioners to Messrs. Gibson, Wilson, and

¹ *Bosanquet v. Anderson*, 6 Esp. 43 (*semble*); *Jones v. Turnour*, 4 C. & P. 204, *accord.* — ED.

Howell, dated the 1st December, 1814, by reason of which and by force of the statute in such case, &c., the interest, title, and right to indorse the said promissory note in the declaration mentioned, before and at the time of the indorsement by G. Clarke, became and was vested in the said assignees, and not in the said Clarke, and thereby the indorsement of Clarke became void, and created no right in the plaintiffs to sue. The plaintiffs joined issue on the first plea, and replied to the second that, after the assignment to the assignees, the indorsement of Clarke was made by him, by and with the consent of the said assignees. Rejoinder denying such consent, whereupon issue was joined. At the trial, before Abbott, C. J., at the adjourned sittings at Guildhall, after Hilary term, 1821, a verdict was found for the plaintiffs for £51 10s., subject to the opinion of the court upon a case which stated the issuing of the commission, and the assignment to the assignees named in the plea, and that they executed a power of attorney to Clarke to collect debts, and sue in their names, &c. At the time of the bankruptcy, the defendant was indebted to Clarke's separate estate in a sum much exceeding the amount for which the promissory note was given. Wilson was the sole acting assignee; and he having desired Clarke to proceed against the defendant for the recovery of the debt, Clarke proposed to take that debt upon his own account, and Wilson assented to that proposal. Clarke informed the defendant of this arrangement, and he gave the promissory note in question in part payment of his debt. Clarke indorsed it for a *bona fide* debt to Knight & Freeman, and the latter indorsed it for a valuable consideration to the plaintiffs. Neither Knight & Freeman nor the plaintiffs knew of the circumstances under which the note was given. Upon counsel being heard in a former term, the court were of opinion that there was not any evidence that the note was indorsed by Clarke with the consent of all the assignees, and they ordered the verdict to be entered for the plaintiffs on the first issue, and for the defendant on the second issue, and that the case should be submitted for argument upon the following question, whether or not the plaintiffs were entitled to the judgment of the court upon the whole record so framed, notwithstanding the verdict found for the defendant on the special plea.

F. Pollock, for the plaintiffs. The question raised upon the pleadings is whether the previous assent of the assignees is necessary, in order to enable a bankrupt to pass the property in a bill or note by indorsement. It is not alleged that the assignees claimed the property, but merely that the bankrupt had no title. It is clear, however, from a series of authorities, that an uncertificated bankrupt has an interest in property acquired after his bankruptcy, unless his assignees

claim it. *Ashley v. Kell*,¹ *Chippendale v. Tomlinson*,² *Webb v. Fox*,³ *Fowler v. Down*,⁴ and *Coles v. Barrow*.⁵ Besides, in this case the note was payable to the bankrupt, or his order. The defendant, by giving such a note, held out to the world that the bankrupt was capable of making an order upon the note, and therefore is estopped now from saying that he was not competent so to do.

Chitty, contra. The property in the note absolutely vested in the assignees, and they took that property, not as individuals, but as trustees for the creditors; and in that character they were bound to take to the property. *Nias v. Adamson*⁶ is a strong authority to show that the property actually vests in the assignees by the assignment; and *Kitchen v. Bartsch*⁷ shows that it is immaterial whether the property came to the bankrupt before or after his bankruptcy. In that case, it was argued, but without success, that the defendant, by having contracted with the bankrupt, was estopped from saying that he had no title. It is true that there the assignees interfered; but *Nias v. Adamson* shows that that makes no difference. And it is clear that a bankrupt, after an act of bankruptcy, cannot pass the property in a bill by indorsement. *Thomason v. Frere*.⁸

ABBOTT, C. J. Looking at this case as it is stated upon the record, and that is the most favorable way in which it can be considered for the defendant, I am of opinion that the plaintiffs are entitled to the judgment of the court. The action is brought upon a promissory note, payable to Clarke, or order, and indorsed by him to a third person, and by him to the plaintiffs. The defendant pleaded, first, *non assumpsit*, and, secondly, the bankruptcy of Clarke on the 19th November, 1814, and an assignment by the commissioners to the assignees, on the 1st of December, 1814, and that thereby the interest, title, and right to indorse the promissory note, before and at the time of the indorsement by Clarke, became vested in the assignees and not in Clarke, and the indorsement of Clarke was void, and created no right in the plaintiffs to sue. To that plea, the plaintiffs replied that, after the assignment to the assignees, the indorsement of Clarke was made by him with the consent of the assignees, and issue was taken and joined upon the fact of such consent; and the jury having found a verdict for the plaintiffs on the general issue, and for the defendant on the other issue, the question is whether the plaintiffs be entitled to judgment, notwithstanding the verdict found for the defendant on the second issue. It must now be taken as a fact that the indorsement

¹ 2 Str. 1207.

³ 7 T. R. 391.

⁵ 4 Taunt. 754.

⁷ 7 East, 53.

² Cooke's B. Laws, 406, 7th ed.

⁴ 1 B. & P. 44.

⁶ 8 B. & A. 225.

⁸ 10 East, 418.

was made by Clarke without the consent of the assignees, and then the question is whether Clarke, having made such an indorsement without the previous consent of his assignees, could thereby transfer any interest in the note to his indorsee. Now, inasmuch as the note, which is a negotiable instrument, is made payable to Clarke, or his order, and it is greatly to the advantage of commerce that such an instrument should be transferable by indorsement, we ought, according to the rules and principles of law, which are framed with a view to the general convenience of mankind, to give effect to the transfer of such a negotiable instrument, unless some plain rule of law interfere to prevent it. Now, is it a just conclusion of law, from the facts stated in the plea, that the right and title to indorse this note was vested absolutely in the assignees? I am of opinion that it is not. If the right and title to the note were vested absolutely in them, it would follow as a necessary consequence that the right and title to every other chattel acquired by an uncertificated bankrupt after his bankruptcy would vest in them absolutely; but the case of *Webb v. Fox*¹ is an authority to show that an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and that he may maintain trover for them against a stranger. It is clear, therefore, that the bankrupt has a property in such goods. The assignees have vested in them a right to interfere and claim the property; and, if they do make any claim, it is effectual against the bankrupt and all the world; but, if they do not interfere, then, as between the bankrupt (or one claiming under him), and his debtor, the latter cannot set up their title; but the bankrupt has a right, in a court of law, to enforce the payment of his debt. In *Kitchen v. Bartsch*, the assignees claimed the property. It does not appear that the assignees here have interfered or made any claim; and, that being so, I am of opinion that Clarke had a right to indorse this bill. If the assignees shall ever claim the amount of the note from the defendant, and their claim should even be available, it will be in some measure the fault of the defendant; for he might have made the note payable to the assignees, and not to the bankrupt.

BAYLEY, J. I am of opinion that the plaintiffs are entitled to retain their verdict on the general issue, and that the verdict on the special plea is not sufficient to deprive them of the judgment in this case. This is an action upon a note payable to Clarke, or to the order of Clarke. The defendant, therefore, by making such note, intimates to all persons that he considers Clarke capable of making an order sufficient to transfer the property in the note. The defence now set up is

¹ 7 T. R. 391.

that, although he has issued a security to the world, importing on the face of it that Clarke was capable of making such an order, yet that in fact he was incapable. Now this is a fraud upon the public. It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world that the other has such power. Thus, in *Taylor v. Croker*,¹ before Lord Ellenborough, a bill was drawn by two infants: the defendants accepted, and the two infants indorsed; and it was held that, inasmuch as the defendants had, by accepting the bill, admitted that the infants were competent to indorse, they should not be permitted afterwards to say that they were incompetent. So in this case the defendant has affirmed to the world that Clarke was capable of making an order. The facts are that the bankrupt indorsed to Knight & Freeman, and that they indorsed to the plaintiffs, and that neither the plaintiffs nor K. & F. knew that Clarke was a bankrupt. It is settled by many decided cases that, though an uncertificated bankrupt cannot resist the claim of his assignees to any property which he has acquired since his bankruptcy, yet that he may acquire property and maintain actions in respect to it, unless the assignees interfere to prevent him. This question was much discussed in *Chippendale v. Tomlinson*. That was an action upon an attorney's bill. The defendant pleaded the bankruptcy of the plaintiff before the bill was incurred, and that plea was held insufficient on the ground that the rights of the assignees were not to be taken into consideration, unless they themselves interfered. That case has since been followed by *Fowler v. Downe*, and other cases. It appears to me that, as the defendant, by the form of his note, has stated that he will pay to Clarke's order, he cannot now allege Clarke's inability to make an order as a ground of defence to this action; and, secondly, that the bankrupt may acquire property subsequently to his bankruptcy, and retain that property against all the world, except his assignees.

HOLROYD, J. I think that the plaintiffs are entitled to the judgment of the court upon the whole record, notwithstanding the verdict found for the defendant upon the special plea. The note was made payable to Clarke, or his order, and there was an indorsement by Clarke upon the note. All persons, therefore, not cognizant of his bankruptcy, would see upon the face of the note that which would, *prima facie*, entitle them to take it. Now, it may be taken as a general rule that indorsees of bills of exchange or promissory notes are entitled to recover the sums for which they are respectively made pay-

¹ 4 Esp. 187.

able, from the persons liable upon the face of the bill or note, notwithstanding the rights of third persons, unless the party taking the bill was cognizant of those rights when he took it. Thus, where a bill of exchange or promissory note, transferable by indorsement, has been lost or stolen, a person deriving his title through another who had no right to indorse may transfer a right to an innocent indorsee. Here the defendant himself gives Clarke authority to indorse, and he asserts to all those who see the bill that Clarke has that authority, and the assignees have not made any claim. I think, therefore, that the defendant is estopped from setting up their rights. It is not true that the assignment vests absolutely in the assignees all the property acquired by the bankrupt subsequently to his bankruptcy. It would be most injurious to the bankrupt if that were so; for if they were unwilling to sue, and he was unable to sue, the consequence would be that he might lose property so acquired, and the residue of his property would remain liable to his debts. *Ashley v. Kell*¹ is an authority to show that property, even the subject of trade and sale, so acquired by the bankrupt subsequently to his bankruptcy, does not pass absolutely to the assignees; and, if that be so, the property acquired by a bankrupt in a negotiable instrument does not so vest in his assignees.

Judgment for the plaintiffs.

HALL AND ANOTHER v. FULLER AND OTHERS.

IN THE KING'S BENCH, JUNE 10, 1826.

[Reported in 5 *Barnewall & Cresswell*, 750.]

ASSUMPSIT to recover £197 as money had and received by the defendants to the use of the plaintiffs. At the trial before Abbott, C. J., at the London sittings after Hilary term, 1824, the jury found a verdict for the plaintiffs, subject to the opinion of this court on the following case:—

The plaintiffs are merchants in the city of London, having at the time of the transaction in question an account with the defendants, as bankers. On the 25th or 26th of August, 1823, Mr. S. Hill applied to J. Hall, one of the plaintiffs, for the loan of a check for £3, stating at the time it was for a friend to send into the country, upon which Mr. Hall drew and delivered to S. Hill the check upon the defendants, using for that purpose one of the printed forms with which the de-

¹ 2 Str. 1207.

defendants supply their customers. The sum for which this check was drawn was written by Hall in words at length, in the body of the check, and also in figures, the latter being in the same line with his signature. Mr. Hill had been induced to apply for the loan of the check by one Wagstaff, who had applied to him for such a check; and Hill, having obtained it, handed it over to Wagstaff. Wagstaff expunged the dates, the figures, and the words three pounds, and also the figures £3 0s. 0d., and substituted the words two hundred pounds and £200 in figures, but in such a manner that no one in the ordinary course of business could have observed. The check so altered was presented by or on account of Wagstaff to the defendants for payment, on the 29th of August, on which day the balance in their hands on the account of the plaintiffs was only £183 15s. 5d. The defendants paid the amount of the check as altered; and, having a day or two afterwards received funds to cover the amount over-paid on the 29th of August, they claimed to retain the whole sum of £200 on account of the check drawn and paid under the foregoing circumstances.

F. Pollock, for the plaintiffs. The plaintiffs are entitled to recover the whole amount of the check. First, assuming that the defendants have not been guilty of any negligence, the loss must still fall upon them, for the altered check was not the check of the plaintiffs; and, therefore, the defendants paid the money without any authority. There is no difference in principle between this case and any other forgery. Suppose the body of a draft had been in the handwriting of the plaintiffs, but their signature had been forged, there can be no doubt that, if the bankers had paid such a draft, they would be liable. Or suppose that it was made payable to a special payee, and his name had been forged, and the bankers paid it to the wrong person, they would have been liable. There is no direct authority in our law upon the subject, but the very point is discussed in Pothier's treatise *du contrat du change*, part 1, c. 4, s. 99, p. 59. It assimilates a case like the present to that of a person employed to execute an order for another (*le contrat de mandat*). There the employer is bound to reimburse the employé all his expenses to which the employment or order gives rise (provided the employé does not, by his own negligence, disburse more than he ought). But he distinguishes between expenses occasioned in the execution of the order or employment (*ex causa mandati*) and those which are incurred accidentally in the course of the employment or order; and ultimately he comes to the conclusion that when a banker pays the full amount of a bill fraudulently altered by the holder, the sum paid beyond that for which it was originally drawn is not a payment made *ex causa mandati*, *sed occasione tantum*, the subsequent fraudulent alteration of the bill which led the

banker into error, and which caused him the loss of the sum he had unduly paid, being an accidental circumstance which neither had been nor could be foreseen, and against which the drawer cannot be supposed to have intended to indemnify the banker.

In *Scholey v. Ramsbottom*, a check drawn by a customer upon his bankers, and which he afterwards cancelled by tearing it into several pieces, was paid by them under circumstances which ought to have excited their suspicion, and induced them to make inquiries before paying it; and it was held that they could not take credit for the amount. Here the bankers have been guilty of negligence. The drawer of a bill of exchange has not any means of discovering whether the instrument which he issues to the world be subsequently fraudulently altered: the banker has some means, and, if he is deceived, must be responsible.

Goulburn, contra. This case is one of novelty and great importance to bankers, who, if the defendants are held liable, will be exposed to constant hazard without any means of prevention. For, if the signature to a check be genuine, a banker is bound at his peril to pay it, although (as frequently occurs) every other part of it be written in a strange hand. And now it is contended that, after he has ascertained the signature to be valid, he is further bound to notice any alteration in the body of the check itself, however minute, or however skilfully effected. It is said that any material alteration in instruments of this nature after they are drawn will render them void, but that is too broad a position. In *Kershaw v. Cox*,¹ a most material alteration in a bill of exchange, viz. the insertion of the words "or order," was held by Lord Kenyon not to vitiate the bill. And as to an alteration in the sum for which the bill is drawn, Scacchia's authority, as cited by Pothier in the passage referred to, is express that in a case like the present the drawer, and not the drawee, must bear the loss: although Pothier, after stating the arguments on both sides, inclines himself to the contrary opinion. As to a supposed analogy between deeds and bills, Mr. Justice Buller in *Master v. Miller* denies that there is any such, and states conclusive reasons for his opinion; and it is clear that such an alteration in a deed as that which took place in the bill in the case of *Kershaw v. Cox*² would have made the deed void. No argument, therefore, can be derived from such analogy. In *Scholey v. Ramsbottom* there was every thing to cause inquiry and suspicion on the part of the bankers. The check had been torn in four pieces, and pasted together again, and when presented was obviously defaced and dirty, which was the express ground of Lord Ellenborough's decision:

¹ 3 Esp. N. P. C. 246.

² 3 Esp. N. P. C. 246.

whereas here it is found that the check "was altered in such a manner that no one in the ordinary course of business would have observed it," which makes the whole difference, and converts that case into a strong authority for the defendants. Then, as to negligence, it is here altogether on the side of the customer. Giving, or rather lending, as he did, this check for so trifling an amount to another person for the purpose of being sent again to a third in the country, was in direct violation of the compact which must be implied between banker and customer; viz., that the latter shall not send abroad his name and signature in this unguarded mode, but shall use them only with due caution, and for the *bona fide* purpose of drawing out his funds for his own occasions. In *Russell v. Langstaff*, it was holden that a person signing his name to a blank stamp was liable for any sum afterwards inserted thereon. In that case, it was argued (as in this) that a note so filled up was not the note of the party who had signed the blank stamp; but it was held by the court that a man thus sending abroad his name and signature must be responsible for all the consequences. So here the plaintiffs have thought fit to lend their name, owing nothing to the party to whom the check was given, and being told by him at the time that it was not for his own use, and that he should not present it for payment. Under these circumstances, it follows that the plaintiffs must bear the loss, and not the bankers, who are not guilty of any negligence, and could not by any care or caution on their part detect the imposition.

ABBOTT, C. J. I am of opinion that the plaintiffs are entitled to recover. Bankers can only charge their customers with sums of money paid pursuant to order. Here, unfortunately, the bankers have paid more than the order authorized them to do; for by that they were directed to pay no more than £3. I have no doubt the bankers cannot charge their customer beyond that sum. The plaintiffs are therefore entitled to the judgment of the court for the excess.

BAYLEY, J. The banker, as the depository of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer; and, to justify the payment, he must show that the order is genuine, not in signature only, but in every respect. This was not a genuine order, for the customer never ordered the payment of the money mentioned in the check.

*Judgment for the plaintiffs.*¹

¹ *Roberts v. Tucker*, 16 Q. B. 560 (forged indorsement); *Belknap v. Nat. Bank*, 100 Mass. 376 (forged indorsement), *accord*.

By Statute 16 & 17 Vict. c. 59, § 19, "Any draft or order drawn upon a banker for a sum of money payable to order or demand, which shall, when presented for

DOD v. EDWARDS.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., MAY 29, 1827.

[Reported in 2 Carrington & Payne, 602.]

ASSUMPSIT on a bill of exchange, dated Sept. 13, 1826, payable three months after date, for £96 11s. 7d., drawn by a person named Hobson, and accepted by the defendant, payable to the drawer's order, and by him indorsed to the plaintiff.

The plaintiff rested on the formal proofs.

Brougham, for the defendant. I am in a condition to show that the bill was indorsed on the 21st of November, and that on the 4th of October the drawer put it out of his power to indorse, by giving a general release to the defendant.

LORD TENTERDEN, C. J. You must show that the plaintiff knew it. If you cannot show that the plaintiff was aware of the release, your defence fails: if it were not so, you would put an end to the circulation of bills.

Brougham. The party, by the release, puts all right out of himself.

LORD TENTERDEN, C. J. It is quite clear that you must trace it to the plaintiff's knowledge.

Verdict for the plaintiff.

YOUNG v. GROTE AND OTHERS.

IN THE COMMON PLEAS, JUNE 18, 1827.

[Reported in 4 Bingham, 253.]

AN arbitrator, to whom disputes between the above parties had been referred, found by his award that George Grote the elder, William Willoughby Prescott, George Grote the younger, and William

payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement, or any subsequent indorsement, was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorsee thereof." See *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, decided under this statute.

Conf. *Smith v. Mechanics' Bank*, 6 La. An. 610, when the drawer's negligence was held to protect the bank which had paid a check to the holder under a forged indorsement. — ED.

George Prescott were entitled to retain the sum of three hundred and fifty pounds two shillings and threepence, the only disputed item in an account referred to in the submission, and that Peter Young had no legal claim or demand whatsoever against them in respect of that item; but stated upon the face of his award the following facts, in order to enable Peter Young to take the opinion of the Court of Common Pleas whether, under the circumstances, he ought to bear the loss of that sum.

Before and in the year 1826, George Grote the elder, W. W. Prescott, G. Grote the younger, and W. G. Prescott carried on business in London, as bankers, under the firm of Grote & Co.

Peter Young, before and in the year 1826, kept cash with, and was in the habit of drawing upon, Grote & Co. drafts or orders for sums of money on paper, issued by the latter, containing printed forms of drafts, having in one line the names of the bankers, in the second line the words "pay ———, or bearer," and at the bottom of the draft the letter "£;" a sufficient space being left between the second line and the bottom of the draft for a third line.

On the 12th August, 1826, P. Young, having occasion to quit his home upon business, by which he was likely to be detained for several days, signed with his name five of these printed checks, without inserting in them any dates or sums of money; and he left the same in the possession of his wife, and desired her, in his absence, to have them filled up for such sums as the purposes of his business might require. On the 19th August, Mrs. Young, in order to pay the wages of different persons employed by her husband, required the sum of fifty pounds two shillings and threepence, and she delivered one of the checks so signed by P. Young to William Worcester, a clerk of P. Young, and desired W. Worcester to fill it up with the sum of fifty pounds two shillings and threepence. Worcester accordingly filled it up with that sum, and showed it so filled up to Mrs. Young, and she desired him to get it cashed; but the check, when it was so filled up and shown to Mrs. Young, presented the following appearance: the first line contained in print the names of the bankers; the second line contained the words "pay wages, or bearer," the word "wages" only being in writing, and the third line contained the words "fifty pounds" and the figures "2s. 3d.;" but the word "fifty" commenced in the middle of that third line, and with a small letter, so that ample space in that line was left for the insertion of other words before the word "fifty:" and there was at the bottom of the draft the figures "50. 2. 3;" but the figure 5 was at a sufficient distance from the letter £ to allow another figure to be inserted between it and the letter £. After Worcester had shown the draft to Mrs. Young in this state, he, without any authority

from her or from Peter Young, altered the sum mentioned in the draft to three hundred and fifty pounds two shillings and threepence, by inserting in the third line of the draft, before the word "fifty," the words "three hundred and," and by introducing at the bottom of the draft, between the letter £ and the figure 5., the figure 3.; and this alteration was made in such a manner that no person, using due and ordinary diligence, could have discovered that it had been made improperly after the draft had been once filled up for another sum, and signed by the drawer. The check so altered was presented by Worcester to Grote & Co., and they paid to him, in pursuance of the order contained in it, and which purported to be that of P. Young, three hundred and fifty pounds two shillings and threepence; and, in an account delivered by them to P. Young, they debited him with that sum. He objected to that debit, alleging that his draft was only for fifty pounds two shillings and threepence. The arbitrator thought that it was his draft for that sum only; but he thought, also, that he had been guilty of gross negligence, by causing his draft to be delivered to Worcester (in whose handwriting the body of it had been filled up) in such a state that the latter could and did, by the mere insertion of other words, make it appear to be the draft of Peter Young for the larger sum; and that as he, partly by his negligence, had caused the bankers to pay the larger sum, he was bound to make good to them the loss, which, by reason of his negligence, they had sustained by paying that sum. If the Court of Common Pleas should think that opinion wrong, then he awarded that Peter Young was entitled to receive from Grote & Co. the sum of three hundred pounds, and ordered accordingly.

Whereupon, a rule was obtained by *Wilde*, Serjt., calling upon Grote & Co. to show cause why they should not pay Young £300. *Wilde* cited *Hall v. Fuller*, where a check which was drawn by a customer upon his banker for a sum of money described in the body of the check, having afterwards been altered by the holder, who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid the larger sum, the court held that he could not charge the customer for any thing beyond the sum for which the check originally was drawn.

Taddy, Serjt., showed cause. Young acted with negligence in leaving a blank check to be filled up by his agent; and his agent acted with greater negligence in permitting the sums to be written on the check in such a position as to admit of the insertion of other words without exciting suspicion. Grote & Co., on the other hand, acted in the ordinary way of business; for they could not refuse to

cash a check signed by their customer. In such a case, the loss must fall on the customer. The very question had been considered by Pothier;¹ who said, — after distinguishing between payments made *ex causa mandati* and *ex occasione mandati*, and holding, contrary to Scaccia, that in general the banker ought to be responsible where he pays, in consequence of a fraud practised by the holder, — “Cependant, si c’était *par la faute du tireur* que le banquier eut été induit en erreur, la tireur n’ayant pas eu le soin d’écrire sa lettre de manière à prévenir les falsifications; puta, s’il avait écrit en chiffres la somme tirée par la lettre, et qu’on eût ajouté zéro, le tireur serait en ce cas tenu d’indemniser le banquier de ce qu’il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c’est à ce cas qu’on doit restreindre la décision de Scaccia.”

Hall v. Fuller is clearly distinguishable. In that case, Hall had given a check to his friend properly filled up for three pounds: his friend handed it over to another, who, by a chemical process, expunged the original sum and inserted a larger. But, Hall having by his mode of signing and drawing the check given no opening to the fraud, the consequences of it fell, in the usual course, upon the banker Fuller, who, being deceived, paid a large sum without authority. In like manner, in Smith v. Mercer² the drawer had done nothing incorrect; and the bankers were held responsible for not knowing his handwriting. In the present case, Young himself, or his agent, the wife, was the cause of the banker’s being misled. Young, therefore, ought to bear the loss.

Wilde. It is the constant practice of merchants to have checks signed in blank: they could not carry on business without doing so. Young’s authority terminated when his wife assented to filling up the check with £50 2s. What was written afterwards was a forgery, for the consequences of which the bankers were liable in the usual way. There was no negligence in Young, for his agent saw the smaller sum duly written upon the check, and both she and Young acted *bona fide*. Hall v. Fuller is in point; for it can make no difference whether the forgery be effected by interpolation or by expunging.

BEST, C. J. Although I entertain no doubt on the subject, this is a case of considerable importance, and the question has been properly raised by the arbitrator. Undoubtedly, a banker who pays a forged check is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority. On this principle, the two cases which have been cited were decided, because it is the duty of the banker to be acquainted with his customer’s hand-

¹ Traité du Contrat de Change, p. 1, c. 4, § 99.

² 6 Taunt. 76.

writing; and the banker, not the customer, must suffer, if a payment be made without authority.

But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. That principle has been well illustrated by Pothier, in commenting on the case put by Scacchia: "*Cependant, si c'était par la faute du tireur que le banquier eut été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications; puta, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté zéro, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de Scacchia.*"

In the present case, was it not the fault of Young that Grote & Co. paid £350 instead of £50? Young leaves a blank check in the care of his wife. It is urged, indeed, that the business of merchants requires them to sign checks in blank, and leave them to be filled up by agents. If that be so, the person selected for the care of such a check ought at least to be a person conversant with business as well as trustworthy. But it was not likely that the drawer's wife should be acquainted with business; and she, acting as her husband's agent, ought not to have trusted to receive the contents of the check any person with whose character she was not perfectly acquainted. If Young, instead of leaving the check with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up; he would have placed the word "fifty" at the beginning of the second line, and would have commenced it with a capital letter, so that it could not have had the appearance of following properly after a preceding word; he would also have placed the figure 5 so near to the printed £ as to prevent the possibility of interpolation. It was by the neglect of these ordinary precautions that Grote & Co. were induced to pay. The case of *Smith v. Mercer* bears no resemblance to the present; but *Chambre, J.*, grounded his judgment on the same principle as that on which we now proceed. In *Hall v. Fuller*, the check was properly drawn by the plaintiff in the first instance; the words which he had written were expunged, and supplied by others in a different handwriting, and the alteration was made, not by the plaintiff's clerk, or a person improperly trusted by him, but by an entire stranger, who accidentally became possessed of the check. If the banker had been discharged in that case, there could be none in which he would be liable. We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer.

PARK, J. I am of the same opinion. *Hall v. Fuller* is clearly distinguishable from the present case; and, though the Lord Chief Justice is reported to have expressed himself somewhat generally, his expressions must be taken to have reference to the facts of the case. But Bayley, J., puts the case on the principle on which I coincide with the Lord Chief Justice here. "The banker, as the depositary of the customer's money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an order which is not genuine, he must suffer." Can any one say that the check signed by Young is not a genuine order? I say it is. The checks left by him to be filled up by his wife, when filled up by her, become his genuine orders. However, the arbitrator finds expressly that he was guilty of negligence; and I concur in that opinion. He leaves blank checks in the hands of his wife, who was ignorant of business; but, having left them with her to be filled up as the exigency of the moment might require, they become, upon her issuing them, his genuine orders.

BURROUGH, J. The arbitrator attaches no blame to the bankers, and it is manifest that the legal blame attaches to their customer. First, he leaves a blank check with his wife as agent for him, and she then causes it to be filled up in an unusual way: at least, a line might have been drawn to fill up the interval before the word "fifty." The blame is all on one side.

GASELEE, J. The arbitrator has not found that the clerk was in the habit of filling up checks for his employer, or of going to the bankers to receive money on his account. Those circumstances might have strengthened the case; but there certainly was great negligence on the part of Young, and therefore the rule must be *Discharged*.¹

¹ *Halifax Union v. Wheelwright*, L. R. 10 Ex. 183, *accord*.

In *Roberts v. Tucker*, 16 Q. B. 560, 580, Baron Parke placed the decision in *Young v. Grote* on the ground "that the customer had by signing a blank check given authority to any person in whose hands it was to fill up the check in whatever way the blank permitted." In *Swan v. North British Co.*, 2 H. & C. 175, 190, Cockburn, C. J., was inclined to rest the decision upon the principle of avoiding circuitry of action. "But these various reasons for the conclusion," remarked Cleasby, B., in *Halifax Union v. Wheelwright*, *supra*, "only show how incontestable the conclusion itself is; and it is, perhaps, only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, — a man cannot complain of the consequences of his own default against a person who was misled by that default, without any fault of his own." See also *Bank of Ireland v. Evans*, 5 H. L. C. 389, 410, 413, 415; *Ex parte Swan*, 7 C. B. N. S. 400, 433, 440, 445; *Orr v. Union Bank*, 1 Macq. 513, 522; *Gumm v. Tyrie*, 4 B. & S. 680, 713; *Belknap v. Nat. Bank*, 100 Mass. 376. — ED.

SENTANCE v. POOLE.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., JULY 17, 1827.

[Reported in 3 Carrington & Payne, 1.]

ASSUMPSIT by the plaintiff as indorsee, against the defendant, as one of the makers of a promissory note, which was in the following form:—

“To Mr. WILLIAM CARLESS,

“High Street, Southwark.

MARCH 4, 1826.

“SIR,—We jointly and severally agree, five months after date, to pay to your order the sum of £220 for value received.

“£220.

“JOHN CORNISH.

“JAMES POOLE.

“Payable at Garraway’s Coffee-House,
’Change Alley, London.”

This note was indorsed, “William Carless.”

It appeared that when the defendant signed the note it was not addressed to any particular person as payee, and that Cornish, the other maker, afterwards inserted the direction, “To Mr. William Carless, High Street, Southwark,” to whom he paid the note in part liquidation of a previous debt, due from himself, for the purchase of goods; and that Mr. Carless subsequently indorsed it to the plaintiff.

The witnesses for the defendant stated that he had been wholly incapable of transacting the most ordinary affairs of life for some years past, and that at the time he signed the note he was of perfectly imbecile mind, and as helpless as a child four years old.

For the plaintiff to show a consideration, there was evidence given that the plaintiff was accustomed to discount bills, and that he had given a check for the amount of the note in question, deducting only the discount; and it was contended by his counsel that he had acted *bona fide* in the transaction.

LORD TENTERDEN, C. J. (to the jury). The question in this case is whether the defendant, John Poole, at the time he put his name to this note, which is drawn in an unusual form, it being “to your order,” and not addressed to any one, was or was not conscious of what he was doing; for, if he was, there must be a verdict for the plaintiff; but, should you be satisfied that he was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of

mind, you ought to find for the defendant. It is a hard case either way, but it is very important that courts of justice should afford protection to those individuals who are unfortunately unable to be their own guardians.

*Verdict for the defendant.*¹

COOPER v. J. MEYER AND W. B. MEYER.

IN THE KING'S BENCH, JANUARY 28, 1830.

[*Reported in 10 Barnewall & Cresswell, 468.*]

ASSUMPSIT by the indorsee against the acceptors of several bills of exchange, some of which were drawn in the name of Woodman, and others in the firm of H. Ullock & Co., payable to the order of the drawer. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Guildhall sittings after Michaelmas term, 1828, bills corresponding with those set out in the declaration were produced, and the handwriting of the acceptors proved, and also that the bills were accepted by them for the accommodation of one Darby. The bills drawn in the names of Woodman and Ullock & Co. were indorsed respectively with those names and by Darby, for whom the plaintiff discounted them; and two witnesses for the plaintiff, who knew Darby's handwriting, stated that they believed the names of the drawers and first indorsers to have been written by him. For the defendant, a person named Woodman, a cousin of Darby, was called, who proved that the name Woodman was not signed by him, and that he never authorized Darby to draw or indorse bills in his name; and similar evidence was given by a member of a firm of T. Ullock & Co., and no evidence was given of the existence of other persons answering the description of the drawers of these bills. Then a witness was called, who stated that he did not think the names of the drawers and first indorsers were written by Darby; and on cross-examination he was asked by the counsel for the plaintiff whether he believed the bills to have been signed and indorsed by the same person? This was objected to as a comparison of handwriting. Lord Tenterden allowed the question to be put, and the witness answered it in the affirmative. His Lordship, in summing up, told the jury that, as there was no proof of the existence of such persons as Woodman and H. Ullock & Co., in whose names the bills were drawn, it was sufficient, as against the

¹ *Briggs v. Ewart*, 51 Mo. 245, 249 (*semble*), *accord*.
Lancaster Nat. Bank v. Moore, 78 Pa. 407, *contra*.
Conf. Hicks v. Marshall, 8 Hun, 327. — Ed.

acceptor, to prove the indorsement to be in the same handwriting as the drawing; but he also desired them to say whether upon the evidence they believed the bills to have been drawn and indorsed by Darby. The jury said that they did, and found a verdict for the plaintiff. In Hilary term, a rule *nisi* for a new trial was obtained, on the ground that the witness should not have been allowed to answer the question objected to at the trial, and that the question was not properly presented to the jury.

The *Attorney-General* and *Campbell* showed cause. There is no doubt that as a general principle it is wrong to admit proof of writing by a comparison of hands. But this case was very peculiar. The bills appeared to have been drawn in fictitious names, and the question put and objected to was not whether the witness could say that the indorsement was written by A. or B., by comparing it with some other writing, but whether the bills had been drawn and indorsed by the same person. Then the question put to the jury was wholly unexceptionable, namely, whether they believed the bills to have been drawn and indorsed by Darby; and there was abundant evidence to warrant their answer in the affirmative.

Gurney, F. Pollock, and Ashmore, contra. The bills in question were accepted by one of two partners, in the name of the firm. But one partner cannot bind another by accepting a bill which is a forgery; and the bills in question, drawn in fictitious names, were so. Or, waiving that point, although the defendant, by accepting the bills, gave credit to the writing of the drawer, yet he might dispute the indorsement, *Robinson v. Yarrow*; and therefore the indorsement should have been proved in the ordinary way. The evidence that the drawing and indorsement were by the same hand ought not to have been admitted. If it was admissible in this case, it would be equally admissible in all others; for the acceptor is always precluded from disputing the handwriting of the drawer.

LORD TENTERDEN, C. J. I am of opinion that both the defendants are bound by these acceptances. It is clear that they were given on Darby's credit, and indeed the jury found that he drew and indorsed the bills. The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so; but if there is, in reality, no such person, I think the fair construction of the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer. The rule for a new trial must therefore be discharged.

BAYLEY, J. The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the sup-

posed drawers. If they chose to accept without making the inquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills.

PARKE, J., concurred.

*Rule discharged.*¹

ALLPORT AND ANOTHER v. MEEK.

AT NISI PRIUS, CORAM TINDAL, C. J., FEBRUARY 24, 1830.

[*Reported in 4 Carrington & Payne, 267.*]

ASSUMPSIT on a bill of exchange drawn by one Williams on and accepted by the defendant, and indorsed by Williams to the plaintiffs.

The witness who was called to prove the handwriting of Williams said that neither the drawing nor the indorsement was written by him, and that he did not know by whom they were written.

Wilde, Serjt., for the plaintiffs, then proved that the defendant had acknowledged that the acceptance was his; and submitted to his Lordship that, as the acceptance admitted the drawing to be correct, the jury might look at the indorsement to see whether it was of the same handwriting as the drawing. The reason why a witness is not allowed to speak to handwriting by comparison is that it is the province of the jury; and it has been decided that the jury may judge by comparison.

TINDAL, C. J. I think you must call some witness to lay some evidence before the jury on which they may decide.

Wilde, Serjt., admitted that he could not carry the case any further, and the plaintiffs were

*Nonsuited.*²

LANGTON v. LAZARUS.

IN THE EXCHEQUER, MICHAELMAS TERM, 1839.

[*Reported in 5 Meeson & Welsby, 629.*]

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, for the sum of £45, dated 29th of November, 1838.

Plea: that before the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on the 1st day of

¹ Littledale, J., had gone to Chambers.

² Macferson v. Thoytes, Peake, 20, *accord*.

Whitney v. Bunnell, 8 La. An. 429; Williams v. Drexel, 14 Md. 566, *contra*.

November, 1838, the same bill was altered, to wit, by the said John Smith (the drawer), in a material part thereof, in this, to wit, that whereas the same bill, when the same was made by the said John Smith as in the declaration mentioned, bore date on a certain day therein in that behalf mentioned, to wit, on the 29th day of October, 1838, the same date was, whilst the same bill was in full force and effect as aforesaid, to wit, on the day and year in this plea first mentioned, altered, to wit, by the said John Smith, to another and different and much later date, to wit, to the said 29th day of November, 1838, whereby the same bill then became and was and is void in law. Verification.

Special demurrer, assigning for causes that the plea is an argumentative traverse of the allegation that the defendant accepted the bill, and that it should simply have traversed that allegation; that the plea does not allege that the alteration was made by Smith after the defendant had accepted or become a party to the bill; and that the allegation that the alteration was made "whilst the said bill was in full force and effect," as in the plea mentioned, is ambiguous in its meaning whether the alteration was whilst the bill was in full force and effect as in the plea mentioned, or as in the declaration mentioned; and that the plea does not state that the defendant was not a consenting party to the alteration, and does not state that the alteration was without his consent or knowledge, and that it does not show how the bill was void.

Joinder in demurrer.

Chandless, in support of the demurrer. The plea is clearly bad. The alteration is not stated to be made after the bill was accepted. In order to make the alteration available as a defence, it must be shown that the date of the bill was altered after it was accepted by the defendant. The allegation that the bill was altered whilst the bill was in full force and effect is uncertain and ambiguous. [LORD ABINGER, C. B. How could it be in force unless it was in circulation, and when an action could have been brought upon it?] It may not be in force until it imposes some legal obligation, but such obligation may arise before the bill is accepted; it may have been drawn and indorsed over, so as to be binding upon some other party, before acceptance. If the date was altered after acceptance, the plea ought to have averred that fact. *Calvert v. Baker*¹ is an authority to show that this defence is admissible under a plea that the defendant did not accept the bill *modo et forma* [PARKE, B. That is no authority for saying that the alteration of a bill may not be pleaded as a defence in this form.]

¹ 4 M. & W. 417.

The court were of opinion that the plea could not be sustained, and

J. Henderson, who appeared in support of it, prayed leave to amend.

PER CURIAM. You may have liberty to amend by stating the alteration to have been made after acceptance.

*Leave to amend accordingly.*¹

MORLEY v. CULVERWELL.

IN THE EXCHEQUER, MICHAELMAS TERM, 1840.

[*Reported in 7 Meeson & Welsby, 174.*]

ASSUMPSIT by indorsee against drawer of a bill of exchange for £100, dated 7th of March, 1840, drawn by the defendant on and accepted by Thomas G. C. Riley, payable to the order of the defendant three months after date; indorsed by the defendant to John Short, and by Short to the plaintiff. The defendant pleaded nine pleas, of which, however, the seventh and ninth only are material to this report.

The seventh plea stated that, after the drawing and accepting of the bill of exchange in the declaration mentioned, and before the delivery of the same to the said T. G. C. Riley, before the same became due and payable, and before the commencement of this suit, and while the defendant, as such drawer as aforesaid, was the holder thereof, and entitled to sue upon the same, to wit, on the 20th of April, 1840, it was agreed between the defendant and Riley that he, Riley, should execute a certain indenture, and thereby assign by way of mortgage certain leasehold premises to the defendant, to secure the payment of a large sum of money, to wit, £853, part of which, to wit, the sum of £703, was theretofore lent and advanced by the defendant to Riley, and for part of which Riley, before the said 20th of April, 1840, gave to the defendant certain bills of exchange, drawn by the defendant on Riley, and accepted by him [stating four bills of exchange, one of which was the bill mentioned in the declaration]; and that the defendant should deliver up to Riley the said four bills of exchange, — that is to say, the three bills of exchange in this plea mentioned, and the said bill of exchange in the declaration mentioned, as discharged and fully satisfied by the said T. G. C. Riley.

¹ *Taylor v. Mosely*, 6 C. & P. 273; *Ward v. Allen*, 2 Met. 53, *accord*.

See *Hamelin v. Bruck*, 9 Q. B. 306. — *Ed.*

Averment, that, in pursuance of the said agreement, the said mortgage was executed by Riley, and accepted and received by the defendant in discharge and satisfaction of the said four bills of exchange, and, thereupon, the said bills respectively were given up and delivered to Riley, as paid and fully satisfied by him, Riley, the acceptor thereof, and not for the purpose of being transferred, indorsed, or otherwise negotiated; that the said bill in the declaration mentioned was indorsed and delivered by Riley to Short, without any consideration or value for the same, and without any authority or sanction from the defendant, as drawer thereof, and that Short indorsed and delivered it to the plaintiff, without any consideration or value for the same, and the plaintiff now holds the same, without having given any consideration or value for the same. Verification.

The ninth plea stated that the said bill of exchange was and is an instrument or bill liable to the charges and duty imposed by the statute in such case made and provided, and that the said bill afterwards, and after the drawing and accepting thereof, and before the same became due, to wit, on, &c., was fully paid and satisfied by the said T. G. C. Riley, and was then, to wit, on, &c., and after the said bill had been so fully paid and satisfied by Riley, according to the statutes in such case made and provided, without any new stamp, or the payment of any rate or duty chargeable thereon, reissued by the said T. G. C. Riley. Verification.

To each of these pleas the plaintiff replied *de injuria*, on which issue was joined.

At the trial before Lord Abinger, C. B., at the last assizes for the county of Surrey, the delivery up of the bills by the defendant to Riley, the acceptor, on his executing a mortgage, was proved as stated in the seventh plea: it appeared also that Riley, before the bill in question became due, indorsed it to Short for a valuable consideration, who also, before it became due, indorsed it for a valuable consideration to the plaintiff. It was not proved that the plaintiff had any knowledge of the circumstances under which the bill had been negotiated by Riley. The learned Chief Baron thought that the seventh and ninth pleas were proved in substance, and directed a verdict on those issues for the defendant, leave being reserved to the plaintiff to move to enter a verdict for him, with £102 damages. *Platt* having obtained a rule *nisi* accordingly,

Thesiger and *Petersdorff* showed cause. The question upon this rule is, not whether the pleas are or are not good in point of law, but whether they were proved in fact. The whole agreement stated in the seventh plea was proved, and that was sufficient to prevent the plaintiff from recovering. Here the acceptor, during the running of

the bill, discharged and satisfied it by agreement with the drawer; and it could not afterwards be negotiated by the acceptor, so as to give a valid title to an indorsee. There is a distinction between the payment of a bill of exchange by a party primarily liable upon it, and payment of it by any other party. If it be paid by the acceptor, it cannot afterwards be negotiated at all: if by another party to it, and if by negotiating it he would make subsequent parties liable upon it, he cannot negotiate it; otherwise he may. The agreement of the indorsers of a bill is that the acceptor shall pay it, or that they in his default shall do so. By his payment of it, that contract is fulfilled. There is no rule of law which says that it is to be paid by the acceptor at the precise moment when it becomes due. It is in that respect like a bond. Most of the cases on this subject were decided before, or without reference being made to the Stamp Act, 55 Geo. III. c. 184, § 19, which enacts that "all promissory notes, bills of exchange, drafts, or orders for money, not hereby allowed to be reissued, shall, upon the payment thereof, be deemed and taken respectively to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available for any purpose whatever." In *Burbridge v. Manners*, it was held that a note which, before it became due, was paid and taken away from the banker's where it lay, and was indorsed, also before it became due, for valuable consideration to the plaintiff, might be recovered upon against the payee. The facts of that case, however, do not appear to be very intelligibly stated; and it was before the Stat. 55 Geo. III. c. 184. [ROLFE, B. The Stamp Act of the 48 Geo. III. c. 149, was then in operation; and the 55 Geo. III. c. 184, § 19, is in terms a re-enactment of the fourteenth section of that statute.] The true rule is laid down in *Beck v. Robley and Callow v. Lawrence* that a bill cannot be indorsed or negotiated after it has been paid, if such indorsement or negotiation would throw a liability on any of the parties who would otherwise be discharged. [LORD ABINGER, C. B. Those were cases where the bill was negotiated after it was due. PARKE, B. A bill may be negotiated even after it is due, if no other person be made liable than before.] Here, however, it is clear that the transaction amounted to payment by the acceptor. He is not bound to wait until the bill becomes due before he pays it. Can he then afterwards negotiate it, so as to make the drawer liable? [PARKE, B. The condition of an indorser of a bill payable after date is this, that he is a surety for the payment of it by the acceptor at a particular time and place, on presentment for payment. If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's check payable to bearer: if the banker pays it before it is

due, he is not protected. There he is doing an act inconsistent with his duty as banker; but there is no such violation of duty in the acceptor paying the bill before it is due, and to the party entitled to receive it. [PARKE, B. But it shows that the obligation of the drawee or acceptor is to pay at a particular time. You will find the legal liability of the drawer and indorser of a bill of exchange very clearly expressed by Mr. Justice Bailey in his work on Bills.¹] In *Bartrum v. Caddy*, where a note payable on demand was indorsed for the maker's accommodation, and, having been deposited in the hands of a creditor of his, was afterwards paid by the maker and reissued, it was held that it was no longer negotiable, by reason of the statute 55 Geo. III. c. 184, § 19. [LORD ABINGER, C. B. There the note was payable on demand, so that it was over-due.] In *Freakly v. Fox*, it was held that a promissory note was discharged by the payee and holder of it having made the maker his executor, and that no action could be maintained on it, even by a party claiming by indorsement from the executor.

But, at all events, the defendant is entitled to the verdict on the ninth plea. The statute 55 Geo. III. c. 184, does not distinguish between payment made at and before the maturity of the bill; but the intention of the legislature was that, after a bill had been in any manner satisfied, it should not be reissued without a new stamp.

Platt and Peacock, contra. First, the plaintiff was entitled to recover on the seventh plea. It can never be said that the rights of a *bona fide* indorsee for value before the bill became due can be affected by a private arrangement between the drawer and acceptor. This bill was never paid, in a legal sense, at all. The undertaking of an acceptor is to pay the bill at a particular time; and that of the drawer and the indorsers, that he shall pay it at that time, or they will be responsible. In pleading, therefore, the obligation of the acceptor is said to be to pay according to the tenor and effect of the bill. Has he satisfied that obligation here? Mere satisfaction of a bill before it is due is not payment of it. And the statute 55 Geo. III. c. 184, § 19, when it speaks of "the payment thereof," means not the mere act of payment, but payment according to the tenor of the bill. In the cases cited on the other side, the instrument had been paid according to its tenor and effect, and therefore could not afterwards be negotiated to the prejudice of innocent parties. In *Freakly v. Fox*, the plaintiff must have known that the defendant had no right to indorse the note except as executor, and therefore that it was discharged by making him executor: he thus had notice that the note was satisfied. It was essential,

¹ Pp. 43, 156 (5th ed.).

therefore, to the defendant's case, in support of the issue on this plea, to prove not only the agreement between himself and the acceptor, but also that the bill was transferred to the plaintiff with notice of it, and without consideration.

Secondly, the ninth plea was not proved. The facts proved on the trial did not amount to payment of the bill, so as to satisfy the allegation in the plea, that it "was fully paid and satisfied" by Riley. That must mean a payment in money; but this was a mere arrangement whereby the bills were considered as satisfied on the execution of a mortgage. It is clear that such evidence would not have supported a plea of payment: if it would, it might equally be proved by a release, or by the delivery of a chattel in accord and satisfaction. Neither can there be any reissuing of a bill until it is over-due: until then, it is in course of negotiation.

LORD ABINGER, C. B. I am of opinion that this rule ought to be made absolute. On the trial, it struck me that the pleas were substantially proved; but, upon consideration, I am satisfied that I was wrong. I think, under the circumstances, the seventh plea could not be supported, unless the allegation that the plaintiff took the bill without any consideration or value was proved. It seems to me that was an essential part of the plea, in order to make out the defence. As to the last plea, I think it is bad in point of law; but the question now is whether it was proved or not. It is bad, on the ground that it does not allege a payment in satisfaction of the bill after it became due. But even supposing that payment by the acceptor in satisfaction of the bill before it became due were a good answer, in point of law, to an action by an indorsee, the plea was not proved; because, upon this issue, the plaintiff had a right to expect proof of actual payment in money, not of a mere accord and satisfaction. If the bill were satisfied otherwise than by payment in money, the plaintiff had a right to expect that the particular kind of satisfaction should be set forth in the plea. Proof of payment, therefore, was essential to support this plea; and, that not having been given, the defendant cannot maintain his verdict upon it.

With respect to the more general question which arises in this case, I am now satisfied, after some doubt, that the plaintiff is entitled to recover. The defendant, the drawer of the bill, agrees with the acceptor, while it is running, to deliver it up to him, in consideration of his having the security of a mortgage of property of the acceptor; and gives up the bill accordingly, without striking out his name as drawer. Before the bill becomes due, a party who is ignorant of this transaction discounts it for the acceptor, and before it becomes due transfers it for value to the plaintiff, who is also ignorant of the transaction. The question then is whether the discharge of a bill by the acceptor,

by an arrangement with the drawer before it is due, can affect the bill in the hands of an innocent holder for valuable consideration. I think it cannot. The contract of the drawer and of each indorser is that the bill shall be paid by the acceptor at its maturity, not before it is due; that it shall be paid, as Mr. Peacock has observed, according to its tenor and effect, — that is, when it becomes due. If, upon its being discharged before it becomes due, the drawer inadvertently leaves his name upon the bill, he is but in the ordinary case of a party who has a bill in negotiation with his name upon it, against his intention. It is in the hands of an innocent holder, who has no notice that it has been discharged. Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them, the parties may circulate them so as to give a title to a *bona fide* holder before they become due; and wherein does this case differ from that? Therefore, a bill is not properly paid and satisfied according to its tenor, unless it be paid when due; and, consequently, if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent indorsee for value from recovering upon it. The rule must therefore be absolute.

PARKE, B. I entirely concur with the Lord Chief Baron, and think that in this case neither of the pleas was proved. [His Lordship stated the seventh plea.] Undoubtedly, if all the facts alleged in this plea had been proved, they would have amounted to a good defence; because the plaintiff would then have been in the same situation as Short, and Short as Riley; and as to Riley the bill was satisfied. But, in order to establish the plea, it was necessary to prove the two allegations which put the plaintiff in the same situation with Riley; viz., that Riley indorsed to Short, and Short to the plaintiff, without value or consideration; whereas, it was proved that there was a valuable consideration for both indorsements. The question, therefore, is whether the fact of the acceptor having satisfied the bill before it became due is any defence against a *bona fide* indorsee. I am of opinion that nothing will discharge the acceptor or the drawer, except payment according to the law-merchant, — that is, payment of the bill at maturity: if a party pays it before, he purchases it, and is in the same situation as if he had discounted it. The rule is laid down correctly by Lord Ellenborough, in *Burbridge v. Manners*, that a payment before a bill becomes due “does not extinguish it, any more than if it were merely discounted;” and that “‘payment’ means payment in due course, and not by anticipation.” The party who takes a bill before it becomes due has no means of knowing whether payment has been anticipated or not. The seventh plea, therefore, was not proved.

As to the cases that have been cited, they are all cases of bills paid at maturity, because they were payable on demand.

With respect to the ninth plea, the question now is whether it was proved in fact. It is bad in point of law; because the payment mentioned in the Stamp Act must be taken to mean payment by the party liable, at the maturity of the bill, and according to the tenor of it: otherwise, there have been many cases wrongly decided. But I agree that, even assuming the plea to be good, it was not proved in fact. It would be essential, in order to support it, to prove payment of the bill in money, and not merely a satisfaction of it by an agreement such as was proved in this case, which was no payment in the proper sense of the word. On a demurrer to this plea, for stating only that the bill had been "paid and satisfied," without stating the mode of payment, the plea would, I think, have been held sufficient, on the ground that those words would be construed to mean payment in money. It follows that, in order to support that averment in evidence, the proof should have been of a payment in money. Neither of these pleas, therefore, being proved, the rule must be absolute to enter a verdict on those issues for the plaintiff.

GURNEY, B., and ROLFE, B., concurred.

*Rule absolute.*¹

BEEMAN v. DUCK.

IN THE EXCHEQUER, FEBRUARY 25, 1843.

[Reported in 11 Meeson & Welsby, 251.]

ASSUMPSIT on a bill of exchange for £175, stated in the declaration to have been drawn by certain persons, under the name, style, and firm of Bradshaw & Williams, upon the defendant, under the name or style of W. Serjeant, payable to the order of Bradshaw & Williams, at three months' date, accepted by the defendant, and indorsed by Bradshaw & Williams to the plaintiff. To this count the defendant pleaded, first, that the said persons therein mentioned did not draw the said bill as alleged; secondly, that the said persons did not indorse it; and, thirdly, that the defendant did not accept it: upon which issues were joined.

At the trial before Wightman, J., at the last Bristol assizes, it appeared that W. Serjeant, who was a partner of the defendant, brought the bill to one Johnson, a prior holder to the plaintiff, with the names of Bradshaw & Williams indorsed upon it, and negotiated it with him. The defendant alleged that the bill was accepted by Serjeant on account of a private transaction with him, and *mala fide*. It was

¹ *Swope v. Ross*, 40 Pa. 186; *Eckert v. Cameron*, 43 Pa. 120, *accord*. — ED.

proved that Messrs. Bradshaw & Williams was a really existing firm, with which Serjeant had been accustomed to deal ; and those persons being called, they swore that neither the drawing nor the indorsement of the bill was theirs, but stated also that the handwriting of both was evidently the same. The learned judge summed up the case to the jury with reference to the question which had been treated in the course of the trial as the principal point in dispute between the parties, viz., whether there was collusion or knowledge on the part of the plaintiff that the bill was made otherwise than for partnership purposes ; and it was not until after the jury had given their verdict for the plaintiff, that his attention was called to the issue denying the indorsement, which it was alleged, on behalf of the defendant, was proved by the evidence of Bradshaw & Williams.

In Michaelmas term, *Bompas*, Serjt., obtained a rule *nisi* for a new trial, on the above ground, against which

Erle and *Montague Smith* showed cause (February 8). The defendant, as acceptor of this bill, was clearly estopped from denying that Bradshaw & Williams drew it ; and it being proved that the handwriting of the indorsement and of the drawing was the same, and the bill having been negotiated with that indorsement upon it by the acceptor, the estoppel applies to the indorsement also, and the defendant is concluded from saying that it was not the signature of those persons. *Cooper v. Meyer*. Lord Tenterden there says : "The acceptor ought to know the handwriting of the drawer, and is therefore precluded from disputing it ; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so ; but, if there is in reality no such person, I think the fair construction of the acceptor's undertaking is that he will pay to the signature of the same person that signed the bill." Such is certainly the rule where the acceptance was prior to the indorsement, and the bill has been passed by the indorser ; but where, as in this case, the acceptor himself puts the bill into circulation with the forged indorsement on it, he is equally estopped to dispute that indorsement. Having accepted a bill drawn by some person in the name of Bradshaw & Williams, without their authority, he undertakes to pay to the order of the same person. *Schultz v. Astley*.¹ If it were otherwise, the acceptor might be enabled to commit the grossest fraud, and yet escape liability. [PARKE, B. It was a question for the jury, according to *Cooper v. Meyer*, whether the bill was drawn in a false name. It was not left to the jury in this case whether the handwriting of the drawing and indorsement was the same.]

¹ 2 Bing. N. C. 544 ; 2 Scott, 815.

Butt, contra. There is a distinction between the case of a fictitious drawer and that of the forgery of the name of a real person as drawer. It is in the former case only that the act of acceptance admits the indorsement. In the present case, the defendant was estopped to deny the indorsement as alleged by Bradshaw & Williams, and there was a distinct issue upon that. [PARKE, B. You say that *Cooper v. Meyer* applies only to the case of wholly fictitious persons, who never could either draw or indorse, because there the acceptor admits that the bill is drawn by somebody, — that is, by the same person who indorses in the same handwriting, — but that here he agrees to pay to the order of Bradshaw & Williams, being estopped only to say that they did not draw the bill.] Yes. The defendant only undertook to pay to their indorsement, and until that is given the plaintiff has no title. The case is not like that of *Gibson v. Minet*, where the acceptors were aware of the forgery; here, for aught that appears, the defendant may have been wholly ignorant that the signature of Bradshaw & Williams was not genuine, and that question was not submitted to the jury.

Cur. adv. vult.

The judgment of the court was now pronounced by

PARKE, B. The only question in this case was whether the indorsement alleged in the declaration to have been made by Bradshaw & Williams was proved. It appears that the issue raised by the traverse of the indorsement was not brought under the notice of the learned judge who tried the case, until the jury had given their verdict upon the principal point in dispute, which the court, on the application for a rule for new trial, refused to disturb; and the argument on showing cause was confined to the question whether the indorsement was proved by the evidence.

The bill was drawn in the name of Bradshaw & Williams, and indorsed in the same name; and there was some evidence of its being properly indorsed, as it was brought by the defendant's partner, with the indorsement upon it, to be discounted by a prior holder. On the part of the defendants, it was shown that this firm was a real one, and proved by both members of the firm that the drawing and indorsement were forgeries.

On the argument before us, it was contended by the plaintiff's counsel that the drawing being a forgery, the defendant, by his acceptance, had undertaken to pay to any one who held the bill by an indorsement in the same handwriting, according to the principle laid down in *Cooper v. Meyer*; and it was said there was evidence in the case that the signatures in drawing and indorsing were those of the same person. If this were so, the rule ought to be made absolute for a new

trial, as the question as to the identity of the signature has not been submitted to the jury.

But on the part of the defendant it is insisted that the case of *Cooper v. Meyer* is distinguishable from the present, for there the drawers were fictitious: here they really existed, though their signature was forged; and that in such a case the acceptor, though he admits that the bill was drawn by the parties by whom it purports to be drawn, does not admit the indorsement by the same parties,—a doctrine which is clearly established, as to bills wherein the signature is not forged. *Robinson v. Yarrow*. In analogy to that case, the defendant, it is said, admits by his acceptance that the bill was drawn in the name of Bradshaw & Williams, by themselves, or some agent authorized to draw in their name; but it does not admit that it was indorsed by themselves, or some agent authorized to indorse, which is a different species of authority. And we cannot help thinking there is great weight in that argument, if the defendant accepted the bill in ignorance of the forgery; but if he knew of it, and intended that the bill should be put into circulation by a forged indorsement, in the name of the same firm, by the same party who drew it, the case seems to fall within the principle of that of *Cooper v. Meyer*. Some doubt, however, occurs, whether the instrument ought not to be declared upon as payable to bearer, according to the case of *Gibson v. Minet*, as ultimately decided by the majority of judges and the House of Lords, and followed by the Court of King's Bench, in the case of *Bennett v. Farnell*. It may be remarked that these cases were not cited, or this question raised, in *Cooper v. Meyer*.

There must therefore be a new trial.

Rule absolute.

HAYES v. CAULFIELD.

IN THE QUEEN'S BENCH, JUNE 23, 1843.

[*Reported in 5 Queen's Bench Reports, 81.*]

ASSUMPSIT. The declaration stated that A. Allison, on, &c., made his bill of exchange, &c., and directed the same to defendant, and thereby required him to pay to the order of the said A. Allison, &c., and defendant accepted the said bill; and the said A. Allison indorsed the same to G. Winch, who indorsed to Lacy, who indorsed to plaintiff: promise by defendant to pay plaintiff, &c.

Pleas: 1. That defendant did not accept, &c.; 2. That the said A.

Allison did not indorse the said bill of exchange to the said G. Winch, in manner and form, &c.; 3 and 4. That Winch did not indorse to Lacy, and that Lacy did not indorse to plaintiff, in manner and form, &c. Issues thereon.

On the trial before Coleridge, J., at the sittings in Middlesex after Trinity term, 1842, the acceptance and the handwriting of the indorsements were proved. There was some evidence that the plaintiff had given value. The defendant's counsel proposed to prove, in support of the second plea, that, although Allison, the payee, had indorsed his name on the bill, he had delivered it to Winch, the second indorser, to be discounted and not to be negotiated, and that Winch had indorsed and transferred it in fraud of Allison; and therefore that, as between Allison and Winch, there had been no indorsement completed by delivery. *Marston v. Allen* was cited. The learned judge rejected the evidence; and a verdict was given for the plaintiff. In Michaelmas term, 1842, a rule *nisi* was obtained for a new trial.

Butt now showed cause. It may be admitted that indorsement, in the proper legal sense, requires not merely writing the party's name on the bill, but a valid delivery also. That is the effect of *Marston v. Allen*; but here the facts are different. [COLERIDGE, J. There was nothing to implicate the plaintiff in the misconduct of Winch: that was the difficulty I had in applying the case of *Marston v. Allen*.] And there was between Winch and the plaintiff an intermediate party, Lacy, who held *bona fide*. The allegations of indorsement in the declaration were satisfied in the first instance by mere proof of writing the name and delivering the bill. If the defendant wished to show that any one of the alleged indorsements did not operate as such, because the bill was handed over for a specific purpose, and transferred in fraud of that purpose, he should have pleaded specially. *Marston v. Allen* differs from the present case, because there the bill never was in fact delivered to any person as indorsee. It was indorsed in blank, and transferred for safe custody only to the person from whom the second indorser received it. The distinction drawn by Lord Denman, C. J., in *Adams v. Jones*, bears upon this point. "A bill may be indorsed to a party in two ways: either by a special indorsement, making it payable to that party; or by a blank indorsement, and delivery to that party. In the latter way, at all events, if not in the former, the bill must be delivered to the party as indorsee, in order to constitute an indorsement to him." Here it may be taken that the bill was delivered to Winch as indorsee; and, if Winch fraudulently indorsed it over (which ought to have been pleaded), the plaintiff was no party to such fraud.

Knowles, contra. The declaration alleges that Allison indorsed to

Winch; the second plea is that Allison did not indorse. That called upon the plaintiff to prove, not merely what was proved here, that Allison wrote his name on the back of the bill and delivered it to Winch, as a person might give his servant a bill to be carried to the banker's, but that it was delivered with an intention to pass some interest. *Goggerley v. Cuthbert*,¹ *Cranch v. White*,² and *Brind v. Hampshire* show that a bill delivered over for a specific purpose only is not, in a legal sense, indorsed, though it have a formal indorsement. It is true that the facts in *Marston v. Allen* were different from those of the present action, but the case turned upon the question what was meant by the term "indorsed" in the declaration; and Alderson, B., in delivering the judgment of the court, said: "It appears to us that the new rules of pleading have really nothing to do with this question. The only point for us to consider is this, — what in point of law is the indorsement of the bill denied by the plea on this record. We have to decide whether, if the facts opened by the defendant had been fully proved, my learned brother ought to have directed the jury that this bill had not been indorsed by John Harrop. If the indorsement denied by this plea simply means the writing of the name of John Harrop on the back of the bill, the plaintiff is right; for these facts have no tendency to disprove that proposition: or, if it means such an act of writing on the bill, followed by the bill being afterwards under any circumstances in the hands of a holder, then also the verdict ought not to be disturbed. But we think neither of these propositions can be sustained in point of law." (Knowles then proceeded to argue that the evidence did not show a giving of consideration by the plaintiff.)

LORD DENMAN, C. J. Under the circumstances of this case, I think the plaintiff proved as much as he was bound to prove. The last of several indorsees brings an action on the bill. The defendant pleads that an intermediate party between the plaintiff and the payee "did not indorse." The only meaning that plea can have is to call in question the handwriting of the indorser. If the dispute were between an indorsee and his immediate indorser, it might be expected that, on such a plea, the plaintiff should be prepared for the question whether or not the transfer of the bill was for a purpose consistent with the intention of the prior indorser; but that is not so where the plea goes no farther than to deny the indorsement of an intermediate party. No suspicion is thrown on the plaintiff here; and it seems to me that without question the defendant was liable.

WILLIAMS, J.,³ concurred.

¹ 2 New R. 170.

² 1 New Ca. 414.

³ Patteson, J., had left the court.

COLERIDGE, J. There was a *prima facie* case for the plaintiff. The evidence offered would have raised no suspicion as to him; and there was proof, though slight, that he had given consideration. As the proposed evidence would have borne only upon the conduct of a prior party, the case stands clear of the decision in *Marston v. Allen*; and, reserving the right, whenever such a question arises, of considering whether all that was said in that case can be sustained, I think the plaintiff here is entitled to retain the verdict.

*Rule discharged.*¹

BRAITHWAITE v. GARDINER.

IN THE QUEEN'S BENCH, JANUARY 27, 1846.

[*Reported in 8 Queen's Bench Reports, 473.*]

ASSUMPSIT. The first count was on a bill of exchange for £76 6s. 4d. drawn by G. D. Clark upon defendant, 15th April, 1844, payable to the order of him the said G. D. Clark at three months, accepted by defendant, and indorsed by Clark to Joseph Banks, who indorsed to plaintiff.

Plea: that, before the making and accepting of the said bill, to wit, on, &c., and from thence, &c., Clark was a trader, &c.; that Clark was indebted and became bankrupt, and a fiat issued, by virtue of which Joshua Evans, Esq., then being a commissioner, &c., adjudged Clark a bankrupt: the plea then set out the further proceedings, down to the appointment of an official assignee (Patrick Johnson), and subsequent choice of other assignees (Harbut John Ward and Alexander Speid Livingstone) by the creditors, ratification of such last-mentioned choice by a commissioner, and acceptance of the appointment by Ward and Livingstone before the making and accepting of the said bill of exchange. Averments: that the said G. D. Clark hath never at any time obtained his certificate under the said fiat, nor hath any certificate ever at any time been signed, sealed, made, or granted by the said Joshua Evans, Esq., such commissioner as aforesaid, or by any other commissioner of the said Court of Bankruptcy, certifying the conformity of the said G. D. Clark to the laws in force concerning bankrupts at the time of the issuing of the said fiat; and that the said

¹ *Lloyd v. Howard*, 15 Q. B. 995; *Barber v. Richards*, 6 Ex. 63, *accord*.

To the same effect with regard to the question of title are *Bramah v. Roberts*, 1 B. N. C. 469; *Bellamy v. Marjoribanks*, 7 Ex. 389; *Carlon v. Ireland*, 5 E. & B. 765; *Goodman v. Simonds*, 20 How. 343; *Wooten v. Inman*, 33 Ga. 41; *Wardell v. Hughes*, 3 Wend. 418; *Greneaux v. Wheeler*, 6 Tex. 515. — ED.

bill of exchange was made and accepted after the bankruptcy of the said G. D. Clark as aforesaid; and that afterwards, and after the commencement of this suit, to wit, on, &c., the said P. Johnson and H. J. Ward and A. S. Livingstone, as assignees as aforesaid, required defendant to pay them the said bill of exchange in the first count mentioned and the whole amount thereof; by reason of which premises, and by force of the statute in that case made and provided, the said P. Johnson and H. J. Ward and A. S. Livingstone became and were entitled to the amount of the said bill of exchange, and to the several sums and causes of action in the first count mentioned. Verification.

General demurrer, and joinder.

Peacock, for the plaintiff. First, the defendant, having accepted a bill drawn by Clark, payable to Clark's own order, is estopped from saying that Clark could not draw such a bill; for, if his present defence be available, he has, by accepting, contributed to a fraud. *Pitt v. Chappelow*¹ is in point. Secondly, the plea, if pleadable at all, ought to have shown the consideration to be such that the debt would pass to the assignees. If, for example, the consideration had been damages recoverable for an assault, the debt would not have passed to them. [PATTESON, J. The bill might have been drawn for money due in respect of personal services done by the bankrupt, after bankruptcy.] It might have been accepted for the drawer's accommodation, and discounted by the plaintiff.

Lush, contra. It cannot be presumed that an acceptance was given otherwise than for value. That, or any other circumstance, showing that the bankrupt drew the bill as a mere trustee, or otherwise defeating the claim of the assignees, ought, at all events, to have been replied. If the bill had been accepted for services as suggested, it was still property which, *prima facie* at least, would pass to the assignees. *Kitchen v. Bartsch*² is an authority on this point, and shows also that the defendant, though he has dealt with Clark, the drawer, as a person having property, may now allege that, as a bankrupt, he could have none. In *Pitt v. Chappelow*, the plea did not allege, as is done here, that the assignees interposed and claimed the debt.

Peacock, in reply. The consideration for the bill is not within the knowledge of a party suing merely as holder: he, therefore, cannot be expected to reply it. [WIGHTMAN, J. A person taking a bill from an uncertificated bankrupt is bound to use caution. In a legal view, the plaintiff must be taken to have had notice of the bankruptcy.] So had the acceptor; yet he, by accepting, holds out that he will pay to the bankrupt's order. At least, if there were any case in which he

¹ 8 M. & W. 616.

² 7 East, 53.

would not be liable, he is bound to show, in pleading, that it exists here. [WIGHTMAN, J. If there was a good consideration for the acceptance, the assignees are entitled to interfere; and is the acceptor liable both to them and to the bankrupt?] He should have taken care to know whether the assignees would interfere or not, before he accepted. If he be now under a difficulty in this respect, he cannot avail himself of it against a holder who, by the acceptance, has been led to expect that payment will be made to himself. [LORD DENMAN, C. J. How do you meet the case of *Kitchen v. Bartsch*?¹] There it was the bankrupt himself who sued. [COLERIDGE, J. The bankrupt being indorser, it may be assumed that he has received value from the indorsee, the amount of which ought to find its way to the assignees. PATTESON, J. In *Pitt v. Chappelow*,² the actual ground of decision was that the proceedings in bankruptcy were not fully set out.] But Lord Abinger expressed a strong opinion on the point of estoppel. [PATTESON, J., referred to *Sanderson v. Collman*.³]

LORD DENMAN, C. J. Lord Abinger was a high authority on subjects of this kind: it is clear what his opinion was on the point of estoppel in *Pitt v. Chappelow*; and I think it rests on sound principles. In this case, all parties knowing the bankrupt's situation, the defendant accepts a bill drawn by him. He thereby admits that the bankrupt had power to draw upon him; and therefore, on a short and simple ground, which is always the best, I am of opinion that the plaintiff has a right to maintain the action. We thought at first that *Kitchen v. Bartsch*⁴ was an authority against the plaintiff; but on examination it is found not to be so. It is contended here that the indorsee of a bill drawn by a bankrupt is bound to reply the circumstances which prevent the bankruptcy from defeating his right, but they may not always be within his knowledge; and the defendant having accepted the bill, any person to whom he has tendered the engagement implied by such acceptance is entitled to say at once, "I will hold you to that engagement." The argument assumes the contrary.

PATTESON, J. I find no direct authority on this point. The decision in *Pitt v. Chappelow*² proceeded on a different ground; but the opinion there expressed by Lord Abinger is very strong. The case of an action by the drawer himself may be different from that in which an action is brought, as here, by the indorsee of a subsequent indorser. I think the plaintiff is entitled to judgment.

COLERIDGE, J. The acceptor is estopped, as against all whose situation he has altered with knowledge of the facts, by accepting. The acceptance here was given after all the proceedings in bankruptcy;

¹ 7 East, 53.

³ 4 M. & G. 209.

² 8 M. & W. 616.

⁴ 7 East, 53.

and the defendant, having known of these, now says to the indorsee: "I will not pay you, who claim under the person to whom I held out the bankrupt as capable of drawing a bill." *Kitchen v. Bartsch*,¹ where the drawer himself brought the action, was a very different case.

WIGHTMAN, J. We must assume here that the indorsee who sues was a *bona fide* holder, and for value. Then the opinion expressed by Lord Abinger in *Pitt v. Chappelow* ² is a very strong authority for the plaintiff. In *Kitchen v. Bartsch*, as has been already observed, the bankrupt himself was the drawer, and the answer which availed against him as a plaintiff cannot serve an acceptor who, of his own authority, has made the bill of the bankrupt negotiable, and is sued upon it by a *bona fide* holder. *Judgment for plaintiff*.³

BENNISON v. JEWISON.

IN THE EXCHEQUER, JUNE 13, 1848.

[Reported in 12 *Jurist*, 485.]

ASSUMPSIT on an instrument described as a bill of exchange drawn at Bombay by T. & Co., accepted by the defendant, then by T. & Co. indorsed to one Fraser, and by him indorsed to the plaintiff. The defendant traversed the drawing, acceptances, and indorsements. At the trial before Parke, B., the defendant's counsel brought evidence to show that the bill was really drawn in London, and consequently could not be received in evidence, for want of being stamped as an inland bill; and the judge, declaring himself satisfied of that fact by the evidence adduced, rejected the bill as evidence, and nonsuited the plaintiff.

Warren moved for a new trial. This nonsuit was wrong for two reasons: first, the place where the bill was drawn is a matter of fact, and consequently ought to have been left to the jury, instead of being determined by the judge: although the case of *Bartlett v. Smith*⁴ seems the other way. [POLLOCK, C. B. All intermediate questions of fact on which the admissibility of evidence depends are to be determined by the judge, and not by the jury. You cannot take an interlocutory verdict, or receive evidence *de bene esse*, leaving it as a matter

¹ 7 East, 53.

² 8 M. & W. 616.

³ *Pitt v. Chappelow*, 8 M. & W. 616, (*semble*), *accord.* — ED.

⁴ 11 Mee. & W. 483; 7 Jur. 448.

to be decided by the jury, at the end of the case, whether it ought to have been received or not. ALDERSON, B. It is for the judge to decide whether sufficient grounds have been laid for letting in secondary evidence. So, on a charge of murder, when the question arises as to whether the deceased were in such a state of mind as to render his dying declarations receivable, that fact is determined by the judge. ROLFE, B. The jury are only sworn to try the issue joined between the parties.] Secondly, it did not lie in the mouth of the acceptor to say, as against an innocent indorsee for value and without notice, that the bill was drawn at another place than where it purports to have been drawn.

POLLOCK, C. B. You would have little chance of maintaining that argument in any court, but least of all in the Exchequer, for the Crown is deeply interested in the inquiry. It would be monstrous if parties could agree to evade the stamp laws.

ALDERSON, B. You are in fact endeavoring to estop the Crown.

PARKE and ROLFE, BB., concurring.

*Rule refused.*¹

SMITH v. MARSACK.

IN THE COMMON PLEAS, NOVEMBER 10, 1848.

[Reported in 18 *Law Journal Reports*, *Common Pleas*, 65.²]

THE second³ count was on a bill drawn by C. Warner on, and accepted by the defendant, and indorsed by C. Warner to the plaintiff.

Plea to the second count, that the said C. Warner, in the said second count mentioned, and therein alleged to be the drawer and indorser to the plaintiff of the said bill of exchange in that count mentioned, before and at the time of the said indorsement thereof by her as aforesaid, was and from thence hitherto hath been and still is the wife of, and married to, a certain male person, to wit, one Edward Warner, who then

¹ *Ex parte Manners*, 1 Rose, 68; *Jordaine v. Lashbrooke*, 7 T. R. 601; *Abraham v. Dubois*, 4 Camp. 269 (*semble*); *Biré v. Moreau*, 2 C. & P. 376; *Bartlett v. Smith*, 11 M. & W. 483; *Steadman v. Duhamel*, 1 C. B. 888; *Field v. Woods*, 7 A. & E. 114; *Latham v. Smith*, 45 Ill. 25 (*semble*); *Pope v. Burns*, 4 I. R.R. 133, *accord*.

Wright v. Riley, Peake, 173; *Blackwell v. Denie*, 23 Iowa, 63; *Robinson v. Lair*, 31 Iowa, 9; *Sperry v. Horr*, 32 Iowa, 184, *contra*.

Conf. Marc v. Rouy, 23 W. R. 89; *Viale v. Michael*, 30 L. T. Rep. 463. — ED.

² 6 C. B. 486, s. c. — ED.

³ The record growing out of the first count raised the question of departure referred to in *Wilders v. Stevens*, *supra*, p. 239. The arguments and opinions on this point are omitted. — ED.

was, and from thence hitherto hath been, and still is, the husband of the said C. Warner, and that the said husband of the said C. Warner, before and at the time of the said indorsement of the said bill by the said C. Warner, was and still is living, and has not at any time authorized or consented to the said indorsement of the said bill by his said wife. Verification.

Replication : that the defendant ought not to be permitted or received to plead the said plea by him above pleaded to the said second count of the declaration, or to say that the said C. Warner, before and at the time she indorsed the said bill in the said second count mentioned, was the wife of the said E. Warner, and that the said E. Warner had not authorized or consented to the said indorsement of the said bill by his said wife, or that the said C. Warner had no power to indorse the said bill, and to transfer to the plaintiff the property therein, because the plaintiff says that the said C. Warner was a married woman, and the wife of the said E. Warner, before and at the time when she made the said bill in the said second count mentioned, and before and at the time of the acceptance of the said bill by the defendant, as well as at the time of the indorsement of the said bill to the plaintiff, as he, the defendant, before and at the said several times of the making and accepting and indorsing of the said bill respectively had and hath always had full notice and knowledge ; and the plaintiff further saith that he, the plaintiff, had not, either before or at the said several times of the making and accepting and indorsing of the said bill respectively, or either of them, or at any time before the commencement of this suit, any notice, nor did he, the plaintiff, at any time before the commencement of this suit know that the said C. Warner was a married woman, and the wife of the said E. Warner, or that she had not power or authority to indorse the said bill and to transfer to the plaintiff the property therein ; and the plaintiff further says that he, the plaintiff, at the time of the indorsement of the said bill to the plaintiff, as in the second count mentioned, gave full value to the said C. Warner for the indorsement of the said bill by the said C. Warner to the plaintiff ; and the plaintiff gave such value, and took the said bill, and became the indorser thereof, as in the said second count mentioned, upon the faith and credit of the defendant's acceptance of the said bill, and the said C. Warner having power, and being a person competent, qualified, and able to indorse the said bill to the plaintiff, and to transfer to the plaintiff the property in the same, and this the plaintiff is also ready to verify, &c., wherefore, he prays judgment if the defendant ought, contrary to his said acceptance of the said bill in the said second count mentioned, and to his own act and acknowledgment, to be admitted to say that the said C. Warner, at the time of the said indorsement by

her of the said bill in the second count mentioned, was the wife of and married to the said E. Warner, and that the said E. Warner hath not at any time authorized or consented to the said indorsement of the said bill by his said wife, or that the said C. Warner had no power to indorse the said bill and to transfer the property therein.

Special demurrer, on the ground that the replication does not show any thing which estops the defendant from disputing the authority of C. Warner to indorse the bill in the second count mentioned.

Aspinall (January 26), in support of the demurrer.

The replication to the plea to the second count is bad. The plea states that the maker and indorser of the bill was a married woman, and had no authority from her husband to indorse. The replication alleges that the defendant is estopped, because he knew the indorser to be a married woman, and that the plaintiff did not. That allegation shows no sufficient ground of estoppel. The plea is a good one. It is clear law that a married woman has no power to indorse bills of exchange without the authority of her husband. *Connor v. Martin*, *Barlow v. Bishop*, *Prince v. Brunatt*.¹

Needham, contra.

The plea to the second count is bad in substance. The fact of the drawer and indorser being a married woman was quite consistent with the plaintiff's right. She might have been a sole trader in London, or her husband might have been *civiliter mortuus*.

Aspinall, in reply.

Cur. adv. vult.

MAULE, J., now (Nov. 10) delivered the judgment of the court.

The second count is on a bill drawn by one C. Warner, payable to her order, accepted by the defendant, and indorsed by C. Warner to the plaintiff. The plea is that C. Warner, before and at the time of the indorsement, was and still is the wife of one Edward Warner, and that he never authorized or consented to the indorsement by her. To this plea the plaintiff has replied by way of estoppel. Several objections to this replication are specially assigned for causes of demurrer, and were argued before us; but it is unnecessary to give any opinion as to their validity, because the court is of opinion that the plea is not a good bar. It does not allege any alteration in the *status* of C. Warner between the time of the drawing and that of her indorsing the bill. The question therefore is, whether in an action by the indorsee against the acceptor of a bill of exchange, made payable to the order of the drawer, it is an answer that the drawer had no capacity to indorse by reason of her having been a married woman at the time of the drawing, and her having continued so till the time of her indorsing

¹ 1 Bing. N. C. 435; s. c. 4 Law J. Rep. (n. s.) C. P. 90.

the bill. And we are of opinion that it is not, upon the authority of the cases of *Drayton v. Dale* and *Pitt v. Chappelow*,¹ cited by Tindal, C. J., in *Sanderson v. Colman*² and *Braithwaite v. Gardiner*; and upon principle, for that as the defendant, by his acceptance, undertook to pay to the order of C. Warner, he cannot, when sued as such acceptor, defend himself by alleging, as a ground of defence, her incapacity, existing at the time of his acceptance, to make an order. In support of a contrary doctrine, the cases of *Connor v. Martin*, *Barlow v. Bishop*, and *Prince v. Brunett*, were cited on the argument by the counsel for the defendant. In *Connor v. Martin*, as reported in *Strange*, the plaintiff declared on a note made to a *feme covert*, and indorsed by her to him, and on argument judgment was given for the defendant, the right being, in point of law, vested in the husband, and the wife having no power to dispose of it; but this case was cited by Denison, J., in *3 Wilson*, 5, from a note of it taken by himself in court, and it appeared from that learned judge's statement that the promissory note in question had been given to the wife before marriage. *Barlow v. Bishop* is certainly a direct authority for the proposition that if a note is drawn payable to a woman or order, and her indorsee sues the maker, he may set up as a defence that she was a married woman, though he knew her to be such at the time he made the note; but it was observed by Lord Abinger, in *Pitt v. Chappelow*, that in this case the plaintiff must be taken to have known the fact of the husband's property in the bill, and he therefore could not take an assignment of it from the wife. Indeed, it appears from the report of the case at *Nisi Prius*, in *3 Espinasse*, 266, that the wife had given a previous note for the money in her own name, and that the note in question was given by the defendant in consequence of such former note being negotiable, which appears to favor Lord Abinger's supposition that the plaintiff must have known of her coverture before the note was indorsed to him.³ In *Prince v. Brunatt*, it was certainly assumed by the court, as well as the counsel on both sides, that such a plea as the present would be a good answer to the action. And the same observations arise with respect to the case of *Cotes v. Davis* and that of *Prestwick v. Marshall*;⁴ but in none of these cases does it appear that the point now under consideration was ever made: viz., that the case falls within the general principle (which is stated by Bayley, J., in his judgment in *Drayton v. Dale*, as applicable to all negotiable securities), that a person shall not dispute the power of another to indorse an instrument when he asserts by the instrument that the other has such power; and we can

¹ 8 Mee. & W. 616; s. c. 10 Law J. Rep. (N. S.) Exch. 487.

² 4 Man. & G. 218; s. c. 11 Law J. Rep. (N. S.) C. P. 270.

³ See *Tryon v. Sutton*, 13 Cal. 490. — Ed.

⁴ 7 Bing. 565.

discover no reason why this principle is not applicable; and, if it is, it appears to us to govern the present case, and to prove that the plea in question is bad. It need scarcely be added that in so deciding we do not mean at all to impugn the proposition that, if a bill or note is made payable to the order of a married woman, the property in it will pass by the indorsement of the husband, as he may sue on it, either joining his wife as a party to the action, or in his own name, at his option: and consequently it cannot be denied that the defendant may possibly be compelled to pay the bill in question twice; but this is a consequence which follows his own act of accrediting the capacity of a woman to indorse, by accepting a bill payable to her order, who, in truth, was incapable. On these grounds, we think that the plaintiff is entitled to our judgment on the second as well as on the first count.

*Judgment for the plaintiff.*¹

HALLIFAX v. LYLE.

IN THE EXCHEQUER, FEBRUARY 26, 1849.

[*Reported in 3 Exchequer Reports, 446.*]

ASSUMPSIT. The first count stated that the Governor and Company of Copper Miners in England, on the 15th of July, A. D. 1847, made their bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the order of the said Governor and Company of Copper Miners in England £2,000, twelve months after the date thereof, which period had elapsed before the commencement of this suit, and the defendant then accepted the said bill, and the said Governor and Company of Copper Miners in England then indorsed the same to the plaintiffs, and the defendant then promised the plaintiffs to pay them the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and indorsement. Breach, non-payment.

The defendant pleaded, fifthly,² that the said Governor and Company of the Copper Miners in England, by whom the said bill is alleged to have been made, as in that count mentioned, before and at the time of the making and indorsing of the said bill of exchange, respectively were, and from thence hitherto have been, and still are, a body politic and corporate in name and in deed, made, created, con-

¹ *Cowton v. Wickersham*, 54 Pa. 302, 304 (*semble*), *accord.* — ED.

² So much of the case as relates to the fourth plea, which was held to be an argumentative denial of the alleged indorsement, has been omitted. — ED.

stituted, and incorporated by and under the name and style of the Governor and Company of the Copper Miners in England, under and by virtue of certain letters-patent, &c.; and that the said bill of exchange purported to be and was a bill made and drawn by the said body corporate, and was accepted by him the defendant, as a bill so made and drawn by the said body corporate, and not otherwise; and that the said body corporate had not, at the time of the said indorsement, or at any time whatever, authority to indorse any bill or bills of exchange, or to issue or negotiate any such bill or bills, or to pass or transfer the right to receive payment of such bill or bills, by an indorsement thereof in the name or under the designation of the Governor and Company of Copper Miners in England, or otherwise howsoever. Verification.

Special demurrer to the fifth plea, assigning for causes that it was an argumentative denial of the indorsement; that it attempted to put in issue matter which the defendant was estopped from denying, viz., that the Governor and Company of Copper Miners ever had authority to indorse the bill as in the declaration mentioned; that it appeared on the face of the declaration that the bill was payable to the order of the said drawers thereof, and therefore that the defendant could not deny the authority of the drawers of the bill to indorse, as in the declaration mentioned; that the plea left it doubtful whether the defendant meant to deny that the Governor and Company of Copper Miners ever had authority to indorse, &c., bills, or whether their authority to indorse, &c., bills, expired or determined after the accepting of the bill, and, if the latter, that the plea should have shown how and in what way such power and authority ceased or was determined; that the plea attempted to put in issue, and did put in issue, matter of law; that the plea was bad for stating that the drawers had not authority to indorse any bill of exchange, instead of showing how or why, or facts from which the court could judge whether such drawers of the bill had such power or not; that the plea should have shown that the drawers of the bill were not a trading corporation at the time of the indorsement of the bill. Joinder in demurrer.

The defendant's points for argument were that the fifth plea was a sufficient answer, because the doctrine, that an acceptor is estopped from denying that the bill is the bill of the supposed maker, does not apply to an indorsement of the bill by the maker, inasmuch as the estoppel rests on the ground that the bill was accepted after it was made, and with full knowledge by the acceptor of the manner of making it; whereas, the indorsement may be subsequent to the acceptance, and consequently not admitted by it; also that the objection was not an objection of fact, which could be met by an estoppel, but an objec-

tion of law, arising out of the fact that the Company were a corporate body, and not authorized to indorse bills.

The demurrer was argued in the present sittings (February 19) by *Prentice*, for the plaintiffs.

The fifth plea is bad. The acceptor of a bill payable to the drawer's order is estopped from denying that the drawer has authority to indorse it. *Pitt v. Chappelow*.¹ The argument of the learned counsel for the plaintiff in that case is applicable to the present.

The case of *Sanderson v. Collman*,² although not precisely like the present, is still in the plaintiffs' favor. It was there held that the acceptor of a bill cannot, in an action against him by an indorsee, dispute the handwriting of the drawer; and, if he do so by plea, the plaintiff may reply the acceptance by way of estoppel. It may perhaps be contended, upon the authority of that case, that the plaintiff ought to have so replied; but the case only shows that he may, and not that he is bound to do so. These cases are at all events authorities for the position that the matter is an estoppel. Admitting that it might be replied in some cases, where the estoppel appears upon the record, the objection may be taken advantage of by demurrer. In 1 Saund. 326 *a*, note (*d*), it is said, "This rule appears to be general, with respect to estoppels by deed, that the estoppel must be pleaded, if there be an opportunity; otherwise, the party omitting to plead it waives the estoppel, and the jury must find the truth. And so with respect to estoppels by matter of record." So in 2 Smith's Leading Cases, 457, it is stated to be "clear that, where the estoppel is apparent on the face of the record, advantage may be taken of it on demurrer." This, it will be seen, was done in *Bowman v. Taylor*,³ and *Hill v. Manchester and Salford Waterworks Company*,⁴ and *Becket v. Bradley*.⁵ [PARKE, B., referred to *Freeman v. Cooke*.⁶] The plea is also bad in form, by reason of the other objections which are raised by the special demurrer. This plea is also an argumentative traverse of the indorsement. *Marston v. Allen*.

Blackburn, contra. The fifth plea is good in substance and in form. It may be admitted that, where an estoppel appears on the face of the record, advantage may be taken of the objection by demurrer. But no estoppel appears here. In *Sanderson v. Collman*, *Erskine, J.*, says in his judgment: "Then comes the next question, whether this answer to the defence set up is pleadable by way of estoppel. Since the new rules, the defence itself could clearly not have been given in evidence under the plea of *non assumpsit*. The defendants, there-

¹ 8 M. & W. 616.

² 4 Man. & G. 209.

³ 2 A. & E. 278.

⁴ 2 B. & Ad. 544.

⁵ 7 Man. & G. 994.

⁶ 2 Exch. 654.

fore, have pleaded that Dæniker & Wegmann, the alleged drawers, did not make the bills. The plaintiffs in their replications add, as a further fact, that which Lord Ellenborough considered material in *Buchanan v. Leach*,¹ — namely, that they took the bills upon the faith of the defendants' acceptance thereof. Why should not that be pleaded? It is laid down that an estoppel may be by act of record, by deed, or by act *in pais*. In the present case, the estoppel arises by an act done by the defendants, which is neither of record nor by deed. It is difficult to say that at the trial the judge might have admitted evidence to prove that the drawing of the bills had been authenticated by the defendants' acceptance, but that the fact could not be pleaded."

An estoppel must be precise. It does not necessarily appear on the face of this declaration that the acceptor made any representation of the ability of the drawer to indorse, that the plaintiffs acted on the faith of such representation, and that thereby their position was altered. It cannot be answered that the acceptor knew the drawers' power to indorse. The plaintiffs should have replied, in accordance with the suggestion in the case of *Sanderson v. Collman*, such a state of facts as would have supported their title. The plaintiffs' argument is that the record admits such a state of facts as amount to an estoppel; but there is no estoppel where any other state of facts could exist as would not amount to an estoppel. Now, suppose the plaintiffs took the bill, knowing the incapacity of the Company to indorse, the defendant would not be estopped in such case. In the case of *Freeman v. Cooke*,² the law of estoppels *in pais* was much discussed. Again, here merely a bare acceptance appears on the record. *Prima facie*, a corporation have no power to indorse bills. *East London Waterworks Company v. Bailey*; ³ *Bayley on Bills*, p. 67. Attending to the preceding considerations, the judgment of the court in *Pitt v. Chappelow*,⁴ upon which the plaintiffs place much reliance, is no authority adverse to the defendant; for the defendant admits that the facts upon which the plaintiffs rely may be replied, and would, no doubt, if proved, establish the plaintiffs' right to succeed. He also cited *Beeman v. Duck*. [PLATT, B., in the course of this part of the argument, referred to *Robinson v. Yarrow*.]

In the second place, the plea is good in form. The new rules require all matters in confession and avoidance to be pleaded specially. Here the defendant admits the indorsement in fact, but pleads by way of avoidance the want of power to indorse; just as if the indorsement had been made by a lunatic. *Alcock v. Alcock*.⁵

¹ 4 Esp. 226.

² 2 Exch. 654.

³ 4 Bing. 283.

⁴ 8 M. & W. 616.

⁵ 3 Man. & G. 268.

Prentice, in reply. The only case which the defendant can suggest, to exclude an estoppel, is that the defendant accepted the bill in blank, and that the plaintiffs took it with knowledge of these facts. But, even in that case, the defendant would be estopped; for, by his acceptance, the defendant gives the drawers full power to fill the bill up as they please. It is immaterial whether a bill be accepted before or after it is drawn. By the acceptance, the defendant contracts to pay to the drawer's order. In *Sanderson v. Collman*, the plea was clearly bad, and the matter of estoppel need not have been replied. The defendant, moreover, admits the plaintiffs to be *bona fide* holders for valuable consideration.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. We think our judgment in this case must be for the plaintiffs. [After stating the pleadings, his Lordship proceeded.] On the argument, the learned counsel for the defendant very properly gave up the fourth plea, and admitted that the judgment of the court upon that must be against him.

He argued very ably in support of the fifth; but we think that also is bad, on the ground that the acceptor of a bill, payable to the order of the drawer, cannot deny the authority of the drawer to draw and indorse. The case of *Sanderson v. Collman* was relied upon on the part of the defendant. That case shows that an estoppel *in pais* may be replied,—it does not follow that it must. My brother Cresswell gives his opinion that the plea itself was clearly bad, because it set up as a defence what, if true, would be no answer to the action; and we think that opinion is correct. The law is well settled by that and former cases, *Drayton v. Dale*, *Taylor v. Croker*,¹ that the acceptor of a bill, or maker of a note, payable to the order of another, cannot be permitted to deny the authority of that person to indorse. It is, in truth, a contract with that other person, *prima facie* for a valuable consideration, to pay to his order, and which is transferable by the law-merchant; and that contract he is bound to perform, as he is all other valid contracts; and if, for the want of such a consideration, it be not a binding contract, he must show it by an affirmative allegation. If the fact be that he accepted the bill or made the note, leaving a blank for the payee's name, and the name was filled in without his authority, he ought to have denied the acceptance of the bill or the making of the note. On this plea, it must be assumed that the acceptance was put on the bill after it was drawn; or that, if it was accepted with the name of the drawer and payee in blank, the name was after-

¹ 4 Esp. 187.

wards filled up by the defendant's authority. That being so, and the plaintiffs being assumed to be holders for value, and *bona fide*, the contrary not being pleaded, what is termed an estoppel appears on the declaration, and the plea is therefore bad. There is stated on the face of the pleadings a valid contract, and binding by the law-merchant on the defendant, to pay to the indorsee of the corporation.

Judgment for the plaintiffs.

MONTAGUE v. PERKINS.

IN THE COMMON PLEAS, JUNE 3, 1853.

[Reported in 22 Law Journal Reports, Common Pleas, 187.]

THE declaration stated that one Henry Swinburn, on the 1st of September, 1852, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said H. Swinburn or order £200 five months after date, and the defendant accepted the said bill, and the said H. Swinburn then indorsed the said bill to one John Huskisson, and the said John Huskisson then indorsed the said bill to the plaintiff, but the defendant did not pay the same.

Pleas, *inter alia*, that the defendant did not accept, and that the alleged cause of action did not accrue within six years before this suit.

The cause was tried before Jervis, C. J., at the sittings for London, on the 15th of May last, when the plaintiff produced the bill, written on a 5s. stamp, which bore date the 6th of March, 1835, and proved that the acceptance was in the defendant's handwriting: the body of the bill was in Swinburn's handwriting. On the part of the defendant, it was proved that, previous and down to the year 1840, the defendant had occasionally accepted bills for Swinburn's accommodation, and had given him others accepted in blank, to take up those bills when due, but that he had never executed any thing in blank since 1840, and never heard of the bill in question till October, 1852. The jury having found that the bill was given in 1840, and not filled up till 1852, and not within a reasonable time, the verdict was entered for the defendant on the issues raised by the first and second pleas, and leave was reserved to the plaintiff to move to enter the verdict for him.

Byles, Serjt., on the 26th of May, obtained a rule *nisi* accordingly, against which

Channell, Serjt., and *Archibald*, now showed cause. The defendant does not deny that a man who issues a blank acceptance *prima facie*

gives authority for the filling up of that acceptance with the amount that the stamp will bear, *Collis v. Emett*;¹ but the mere writing a name across a bill stamp does not of itself constitute a bill. It amounts to no more than evidence of an authority to fill it up, and that within a reasonable time; for, according to the principle upon which *Roberts v. Bethell*² was decided, the drawing and acceptance are to be taken to have been within a reasonable time of each other. If so, then it was a question for the jury whether the authority had been in this case pursued. *Muilman v. D'Eguino*. In *Temple v. Pullen*, the question whether a blank promissory note had been filled up within a reasonable time was left to the jury, and the court said, "It was entirely a question for them what was reasonable under the circumstances."

[MAULE, J., referred to *Mellish v. Rawdon*.³]

Here, the jury have found that the bill was not filled up within a reasonable time, *i.e.* not within the time limited by the authority. The case, therefore, is not distinguishable from *Awde v. Dixon*. There the defendant agreed to join his brother in making a promissory note for his accommodation, provided R. would also join. The defendant accordingly signed an instrument in the form of a promissory note, a blank being left for the name of the payee. R. refused to join; and afterwards the defendant's brother delivered the imperfect instrument to the plaintiff for value, representing that he had authority to deal with it, and the plaintiff's name was inserted as payee. The court held that the plaintiff could not recover on this note against the defendant. Alderson, B., said, "A blank acceptance is not of itself an authority to make a complete bill, but only evidence of authority. *Molloy v. Delves*.⁴ Here the defendant signed his name to a piece of paper, giving his brother authority to make it a promissory note on certain terms: he makes it a note on other terms."

[CRESSWELL, J. The defendant there never consented to his name being made use of, unless R. would also join. He gave his brother only a conditional authority.]

So here the condition annexed to the authority is to fill the paper up within a reasonable time.

[CRESSWELL, J. This does not differ from the case of a merchant employing an agent to sell a cargo of cotton for him, the agent being held out to the world as having a general authority to sell. His principal may have given him private instructions; but if, in selling, the agent violates his instructions, his principal is nevertheless bound.]

¹ 1 H. Black. 313.

² 22 L. J. C. P. 69.

³ 9 Bing. 416; s. c. 2 Law J. Rep. (N. S.) C. P. 29.

⁴ 7 Bing. 428; s. c. 9 Law J. Rep. C. P. 171.

As to the second plea, the defendant was at liberty to show the real date when the bill was accepted. *Steele v. Mart.*¹ The real date was 1840, and the Statute of Limitations began to run at the expiration of five months from that time.

[MAULE, J. You must contend that the right of action accrued before the bill was drawn, for the bill was not filled up till 1852.]

Byles, Serjt., in support of the rule. The rule must be absolute to enter the verdict for the plaintiff on the second issue.

[JERVIS, C. J. There is nothing in the point made as to the Statute of Limitations.]

Then, as to the first plea, the defendant's blank acceptance was a letter of credit to Swinburn for any amount limited by the stamp. *Russel v. Langstaffe*. There it was held that an indorsement written on a blank note or check will bind the indorser for any sum and time of payment which the person to whom he intrusts the bill chooses to insert in it. When the bill gets into the hands of a *bona fide* holder for value, any limitation of authority between the drawer and acceptor cannot be inquired into. In that respect, the present case is distinguishable from *Awde v. Dixon*. The plaintiff there was not a *bona fide* holder for value; and Parke, B., points that out in his judgment. In *Schultz v. Astley*,² it was argued that by giving a blank acceptance the acceptor only authorized the party to whom it was given to draw the bill, and no other; but the court held that it did not lie in the mouth of the acceptor to say that the drawing was irregular. The same principle is established by *Cruchley v. Clarence*, where the defendant drew a bill on M., leaving a blank for the name of the payee, and the plaintiff, a *bona fide* holder, filled in his own name: the court held that the defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill. The same point was decided in *Attwood v. Griffin*.³

[CRESSWELL, J. Suppose the defendant had lost this blank acceptance, would he have been liable upon it, if the finder, without his authority, had filled it up?]

Yes, to an indorsee for value without notice; as where A., by false representations, induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for £100, and induced C. to advance him £100 on it, Garrow, B., held that C. had his remedy on the note against B. *The King v. Revett*.⁴ With respect to the time within which a blank acceptance may be filled up, if a man issues a blank acceptance the day before he dies, the drawer

¹ 4 B. & C. 272.

² 2 Bing. N. C. 544; s. c. 5 Law J. Rep. (N. S.) C. P. 130.

³ Ry. & M. 425.

⁴ Byles on Bills, 103, 6th edit.

may fill it up, as of a day before the death, and a *bona fide* holder may recover against the executor. *Usher v. Dauncey*.¹ There A., a member of a firm, drew a bill in blank in the name of the partnership firm, payable to their order, and, having likewise indorsed it in the name of the partnership firm, delivered it to a clerk to be filled up for the use of the partnership. After A.'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to A.'s death. Lord Ellenborough held that the surviving partners were liable, as drawers of the bill, to a *bona fide* indorsee for value.

[JERVIS, C. J. No doubt. The power there emanated from the partnership: the death of one member of it did not annul an authority given by him on behalf of all the others.]

The bill here must be taken to have been filled up before the acceptance was written: a man is not bound to see which was written first nor to ascertain the date of the stamp. In fact, unless the defendant can show that the plaintiff is not a *bona fide* holder for value, he cannot say that this was a blank acceptance at all. This is an answer to *Temple v. Pullen* and *Mulhall v. Neville* there cited, even if those cases are to be taken as deciding any thing.

Fortescue, on the same side, was not called upon.

JERVIS, C. J. It seems to me that I was wrong at the trial in directing the verdict to be entered for the defendant, and that I ought to have directed it to be entered for the plaintiff, although the jury might have been right in finding that the bill was not filled up within a reasonable time, and I might have been right in leaving that question to them, on the authority of *Temple v. Pullen* and *Mulhall v. Neville*. It is admitted by my brother Channell that the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the time, to which the stamp extends; but he contends that the authority so given is an authority to fill it up within a reasonable time, and that, as the authority in this case was not pursued in that respect, the party giving the acceptance is not liable. I think that is not the case with reference to the rights of a *bona fide* holder for value. The rules applicable to the question of authority on this bill of exchange do not differ from those which ought to govern the question, if it arose in the ordinary case between principal and agent. In the case of a blank acceptance, *prima facie* the person giving it gives the person to whom it is given an opportunity to fill it up for the amount, and for the time limited by the stamp laws. As between those two, there may be secret stipulations binding upon them, but not binding as between the public and the person giving the blank acceptance. As said by Lord Ellen-

borough, in *Cruchley v. Clarence*, the defendant has chosen to send the bill into the world in that form, and the world ought not to be deceived by his acts. How does this differ from the ordinary case of an agent, held out to the public at large as competent to contract for and to bind his principal? The agent may have secret instructions; but, notwithstanding he deviates from them, the principal is bound by his acts. So here the defendant, when he put the blank acceptance into Swinburn's hands, gave the latter power to issue it, as if he had a general and unlimited authority; and the defendant must be bound by the acts of his agent, to whom he gave this power. This is what is said by Lord Mansfield in *Russel v. Langstaffe*, that an indorsement on a blank note is a letter of credit for an indefinite sum. The cases of *Temple v. Pullen* and *Mulhall v. Neville* are not at variance with this. For these reasons, I am of opinion that the rule must be absolute to enter the verdict for the plaintiff.

MAULE, J. I think so too. The defendant, when he wrote his name in blank, and issued this acceptance, must have known what was obvious to anybody, that he put it in the power of any person to whom he gave it to fill it up, and pass him off as having accepted the bill for any amount at any time warranted by the stamp. He must be taken to have intended the natural consequence of his act. If this were not so, and a *bona fide* holder were not to be protected, then a person who had used the utmost care might be subjected to a loss, in order to relieve another who had used no care, but had put the person to whom he gave the acceptance in a position to impose upon the most innocent and cautious. No case has been cited which decides the contrary; and I think we may without any conflict with previous cases, and in affirmance of a principle of mercantile law in favor of the negotiability of these instruments, and to protect innocent holders for value, decide that the defendant is liable, and that this rule should be made absolute.

CRESSWELL, J. I entirely agree to this. A person who gives another possession of his signature on a bill stamp *prima facie* authorizes the latter as his agent to fill it up, and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority; and he cannot say to a *bona fide* holder for value, who has no notice of any secret stipulations, that there were secret stipulations between himself and the agent, any more than can a principal, in the case already put, where he enables his agent, buying or selling on his behalf, to represent himself as acting under a general authority.

TALFOURD, J., concurred.

*Rule absolute.*¹

¹ *Schultz v. Astley*, 2 B. N. C. 544; *Wolstenholme v. Hampson*, 20 Sol. Jour. 283; *Goodman v. Simonds*, 20 How. 343; *Pittsburgh Bank v. Neal*, 22 How. 96; *Roberts*

BARKER AND ANOTHER v. STERNE.

IN THE EXCHEQUER, MAY 1, 1854.

[Reported in 9 *Exchequer Reports*, 684.]

THE declaration stated that one Matthes, on the 1st of August, 1853, in parts beyond the seas, to wit, at Redevitz, in the kingdom of Bavaria, by his bill of exchange now over due, directed to the defendant, required the defendant to pay that first of exchange to the order of Messrs. Seegers, £320 sterling, two months after date, and the defendant accepted the said bill of exchange, and Messrs. Seegers indorsed it to the plaintiffs, but the defendant did not pay the bill. There were pleas denying the making, acceptance, and indorsements of the bill, upon which issues were joined.

At the trial before Pollock, C. B., at the London sittings after last term, it appeared that Messrs. Seegers, who were commission agents in London, were in the habit of receiving consignments of goods from one Matthes, a merchant residing at Redevitz, in Bavaria. On these occasions, it was usual for Matthes to send to Messrs. Seegers a blank

v. Adams, 8 Port. 297; *Herbert v. Huie*, 1 Ala. 18; *Decatur Bank v. Spence*, 9 Ala. 800; *Robertson v. Smith*, 18 Ala. 220; *Elliott v. Levings*, 54 Ill. 213; *Gillaspie v. Kelly*, 41 Ind. 158; *McDonald v. Muscatine Bank*, 27 Iowa, 319; *Joseph v. First Nat. Bank*, 17 Kas. 256; *Smith v. Lockridge*, 8 Bush, 423; *Woodfolk v. Bank of America*, 10 Bush, 504; *Abbott v. Rose*, 62 Me. 194; *Putnam v. Sullivan*, 4 Mass. 45; *Ives v. Farmers' Bank*, 2 All. 236; *Tumilty v. Mo. Bank*, 13 Mo. 276; *Farmers' Bank c. Garten*, 34 Mo. 119; *Van Duzer v. Howe*, 21 N. Y. 531; *Day v. Saunders*, 3 Keyes, 247; *Griggs v. Howe*, 31 Barb. 100; *St. Clairsville Bank v. Smith*, 5 Oh. 222; *Fulerton v. Sturges*, 4 Oh. St. 529; *Weirick v. Mahoning Bank*, 16 Oh. St. 296; *Schryver v. Hawkes*, 22 Oh. St. 308; *Nichol v. Bate*, 10 Yerg. 429, *accord*.

Temple v. Pullen, 8 Ex. 389; *Mulhall v. Neville*, 8 Ex. 391; *Morehead v. Parkersburg Bank*, 5 W. Va. 74, *contra*.

Conf. Mitchell v. Ringgold, 3 Har. & J. 159.

An instrument possessing all the essential marks of a bill or note is none the less incomplete within the doctrine of the principal case, if it contain blanks for any of the incidental features of a bill or note; for example, blanks for the place of payment or rate of interest. *Spitler v. James*, 32 Ind. 202; *Kitchen v. Place*, 41 Barb. 465; *Redlich v. Doll*, 54 N. Y. 234; *Fisher v. Dennis*, 6 Cal. 577 (*semble*); *Visher v. Webster*, 3 Cal. 109; *Rainbolt v. Eddy*, 34 Iowa, 440.

But see *Holmes v. Trumper*, 22 Mich. 427, and *Washington Bank v. Ecky*, 51 Mo. 272, *contra*. Of these two cases, however, the former was decided in great measure upon the authority of *Worrall v. Gheen*, 39 Pa. 388, which has since been overruled in *Garrard v. Haddan*, 67 Pa. 82; and the latter was substantially overruled in *Shirts v. Overjohn*, 60 Mo. 305, 312.

See also *Wade v. Withington*, 1 All. 561. — Ed.

form of a bill of exchange, with his signature as drawer, and they filled it up and got it accepted by the purchaser of the goods. In accordance with that course of dealing, Matthes, at Redevitz, signed, as drawer, a blank form of the bill in question, and sent it to Messrs. Seegers in a letter advising them of a consignment of goods, and Messrs. Seegers in London filled up the blanks by inserting the date, amount, &c., as stated in the declaration; and, having got the bill accepted by the defendant, applied it to their own purposes, when it was *bona fide* indorsed to the plaintiffs for value.

It was submitted, on behalf of the defendant, that, as Messrs. Seegers had only a limited authority to fill up the blank form, in order to obtain payment of the goods consigned to them, this was in effect a bill drawn in London, and therefore required a stamp. The learned judge overruled the objection, and a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter a verdict for him.

Montagu Chambers moved accordingly (April 22). The instrument in question was an inland bill of exchange, and therefore required a stamp. The blank form having been filled up for a purpose not authorized by the party who signed it as drawer, it never became his bill. *Snaith v. Mingay*¹ is distinguishable. There certain partners resident in Ireland signed as drawers, and indorsed the blank form of a bill of exchange, and transmitted it to their copartner in England for his use: he accordingly filled up the blanks, and negotiated it; and it was held to be a bill of exchange by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary. But in that case the person who filled up the blanks acted in accordance with the authority given him by the drawers, so that the instrument, when completed, took effect from the time of their signature. Here, however, there was only a limited authority to fill up the form for a particular purpose; and, it having been used for a different purpose, the case is the same as if the bill had been entirely made in England. According to *Snaith v. Mingay*, the true test is this, when was the person signing the paper bound as drawer? He cannot be bound by an act done contrary to his directions. If a person gives his blank acceptance, with authority to fill it up with a particular sum, and the party so authorized fills it up with a larger sum, that is a forgery. Then, if this be treated as a valid bill as against the acceptor, it only became a bill in England. *Steadman v. Duhamel*² shows that, although the bill purports on the face of it to be a foreign bill, the acceptor is not estopped from showing that it was in fact drawn in London.

Cur. adv. vult.

¹ 1 M. & Sel. 87.

² 1 C. B. 888.

POLLOCK, C. B., now said. This was a motion for a new trial, in a case tried before me at Guildhall. It was an action on a bill of exchange, drawn abroad in blank, and filled up in London. Mr. Chambers moved for a new trial, on the ground that the blank form of the bill having been improperly filled up contrary to the direction and intention of the drawer, it was not binding as against him, and that it only became a bill in London, and consequently required a stamp. We are of opinion, on the authority of *Snaith v. Mingay*, that this is not an inland bill, and therefore no stamp is necessary. It seems to us that the mode in which Mr. Chambers presented the objection must fail; for in reality, *quoad* mankind at large, the authority of the person who holds such a piece of paper with the name of a drawer or an acceptor upon it must be judged of from the paper itself. If a person in this country puts his name to a blank form of bill, either as drawer or acceptor, it may be filled up with any amount the stamp will bear; and he cannot shelter himself from liability by any private instructions contained in a separate document, of which the rest of the world must necessarily be ignorant. There is a case where a customer of a banker, on leaving home, gave to his wife several blank forms of checks, signed by himself, and desired her to fill them up according to the exigency of his business. She filled up one of them so carelessly, that a clerk to whom she delivered it was enabled to alter the amount to a larger sum, in such a way that the bankers could not discover the alteration, and they paid it: it was held that the loss must fall on the drawer, as it was caused by his negligence. Now, whether the better ground for supporting that decision is that the drawer is responsible for his negligence, which has enabled a fraud to be practised, or whether it be considered that, when a person issues a document of that kind, the rest of the world must judge of the authority to fill it up by the paper itself, and not by any private instructions, it is unnecessary to inquire. I should prefer putting it on the latter ground. For these reasons, we think that, in this case, there ought to be no rule. The ground of the motion is founded on the want of a stamp, and for this purpose it is to be assumed that the bill was in the hands of the plaintiffs as *bona fide* holders for value, and without notice of any instructions to fill up the blank form for a particular purpose.

*Rule refused.*¹

¹ *Snaith v. Mingay*, 1 M. & Sel. 87, *accord*.

See *Abrahams v. Skinner*, 12 A. & E. 763; *Ex parte Hayward*, L. R. 6 Ch. 546. — Ed.

INGHAM v. PRIMROSE.

IN THE COMMON PLEAS, JUNE 28, 1859.

[Reported in 7 Common Bench Reports, New Series, 82.]

THIS was an action upon a bill of exchange drawn by one Charles Murgatroyd upon and accepted by the defendant, and indorsed by Murgatroyd to one King, and by King to the plaintiff.

Plea: that the defendant accepted the said bill of exchange in the declaration mentioned, and delivered the same to the said Charles Murgatroyd, who took the said bill from the defendant for a special purpose only, to wit, that he might get it discounted for the defendant, and pay him over the proceeds, which purpose wholly failed, nor was there ever any value or consideration for the defendant's said acceptance of the said bill, or for the payment by him of any part of the amount thereof, and the said bill was never discounted for the defendant; that, after the said bill had been so accepted by the defendant, and whilst it was held by the said Charles Murgatroyd for the purpose aforesaid, the said bill was, with the consent of the defendant and the said Charles Murgatroyd, cancelled by the same being torn into two parts for the purpose of cancelling and destroying the said bill, and the purpose for which the defendant had accepted and the said Charles Murgatroyd had held the said bill was then revoked and determined; that the said Charles Murgatroyd afterwards, wrongfully, and without the consent of the defendant, joined the said parts of the said bill, and negotiated the same for his own purpose and in fraud of the defendant, who never authorized the same being indorsed or negotiated; and that the said bill was never indorsed to or held by any person who took the same *bona fide* and for value or consideration, and without notice of the premises, and before the same had become overdue according to its tenor.

Upon this plea, the plaintiff joined issue.

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary term, 1858. The facts which appeared in evidence were as follows: The defendant accepted the bill declared on, and gave it to Charles Murgatroyd for the purpose of procuring it to be discounted for his use. Murgatroyd tried, but in vain, to get the bill discounted, and returned it to the defendant, who, in Murgatroyd's presence, tore the paper in half, and threw it away in the street. Murgatroyd picked up the bill, observing that it was better not to throw it down in the street; whereupon the defendant said nothing.

Murgatroyd afterwards pasted together the two pieces of paper, and passed the bill away to one King, who afterwards indorsed it to the plaintiff.

The jury found that the defendant when he tore the bill in half, and threw it away, intended to cancel it; that King, *bona fide*, gave £15 for the bill; but that the transaction between King and the plaintiff was not *bona fide*.

The learned judge thereupon directed a verdict to be entered for the defendant, but gave the plaintiff leave to move to enter the verdict for him, the court to be at liberty to draw inferences of fact.

Cross, in Easter Term, 1858, accordingly obtained a rule *nisi*. He referred to Robins v. Viscount Maidstone.¹

Pearce, in Trinity term, showed cause. The finding of the jury, which was well warranted by the evidence, that the bill was torn by the drawer *animo cancellandi*, and that there was no consideration as between King and the plaintiff, sustains the plea. Further, this instrument altogether ceased to be a bill before it was put in circulation, and therefore the plaintiff could acquire no rights upon it against the acceptor. [WILLIAMS, J. That depends upon the meaning of the words "cancelling and destroying" in the plea.] It is submitted that any subsequent issue of the bill, after an act done by the acceptor intimating an intention to cancel it, would be an act of forgery.

Cross, in support of his rule. The mere finding of the jury that the acceptor tore the bill in half with the intention of cancelling and destroying it is not enough to invalidate the bill in the hands of a *bona fide* holder. It was owing to the defendant's own laches that an opportunity was given to Murgatroyd to make an improper use of the bill. The circumstance of the bill appearing to have been divided did not call for the exercise of any extraordinary caution on the part of a subsequent indorsee; for it is not an uncommon thing for bills and notes to be cut in half for the more safe transmission of them through the post.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court.

This case was argued before the late Lord Chief Justice, my brothers Willes and Byles, and myself. We are of opinion that the plaintiff is entitled to judgment. It is, we think, settled law that, if the defendant had drawn a check, and before he had issued it he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it had been

¹ 4 Q. B. 811.

lost or stolen before he delivered it to any one as indorsee.¹ The reason is that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud.

If these were all the facts of the case, it appears to be impossible to distinguish it in any material point from the cases already mentioned, of liability when the original circulation has been effected by fraud, without the consent of him who made the instrument.

The question, then, is, whether such liability is precluded by the fact that, before the instrument was put into circulation for the second time, the defendant had torn it, with the intention of destroying or annulling it.

If an act done with such an intention by the maker of a negotiable instrument does not manifest the intention on the face of the instrument, it can hardly be maintained that the act would be of any efficacy, because the instrument would nevertheless be apparently a part of the mercantile currency; as, for instance, if in the present case the defendant had merely crumpled up the bill in his hand and thrown it away, and it had been restored to its original appearance, without leaving any trace of the act which was intended to annul it. But if, on the other hand, the act be such that the paper bears on the face of it the signs of something having been done to it which is characteristic of an intention to destroy or annul it; as in the case of *Scholey v. Ramsbottom*, where the drawer of a check tore it into four pieces and threw it from him, and the four pieces were afterwards neatly pasted together upon another slip of paper, but the rents were quite visible, and the face of the check soiled and dirty, — no holder of an instrument in such a condition could enforce it, because, in truth, no man of ordinary intelligence and caution could fairly regard it as part of the apparent commercial currency.

The case before us, therefore, appears to turn on the question whether the act of tearing the bill into two pieces, being manifest on the face

¹ See the judgment in *Marston v. Allen*, 8 M. & W. 504; *supra*, p. 279, s. c.

of it, is such an act as, *prima facie*, ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation. As we understand the facts, the tearing had been done in such a way that the appearance of the bill when it reached the plaintiff's hands was at least as consistent with its having been divided into two, for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it. It was, properly, a question for the jury, whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose. But the point has been so reserved at the trial that the court is to perform the function of the jury in this respect; and we cannot find enough on the facts of the case, or on an inspection of the bill itself, to justify us in coming to such a conclusion.

But it is argued, on the part of the defendant, that the putting together of the two halves under the circumstances amounted to forgery, just as much as if some signature which he had written for a different purpose had been taken from its proper place, and fraudulently attached as his signature to the bill.

This would be a very narrow ground of decision, inasmuch as it would concede that the bill would be enforceable if the tearing had stopped short of utterly dividing the paper, or if the bill had come to the plaintiff's hands in the halves, by two successive posts, with an intimation that it was so sent to him for the purpose of safer transmission.

However, it seems to us that, even assuming that the act of thus reconstructing the bill constituted a forgery (which may admit of grave doubt), yet, on the principle of the decision of *Young v. Grote*, this would be no answer to the claim of the plaintiff, because the defendant, by abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff's becoming the holder of it for value, and without having any just cause for supposing that it had been cancelled or annulled.

The rule must therefore be absolute for entering a verdict for the plaintiff for the amount of the bill and interest.

Rule absolute accordingly.

THIEDEMANN *v.* GOLDSCHMIDT AND OTHERS.

IN CHANCERY BEFORE LORD CAMPBELL, C., AND SIR JAMES LEWIS
KNIGHT BRUCE, AND SIR GEORGE JAMES TURNER, L. JJ., No-
vember 8, 1859.

[*Reported in 1 De Gex, Fisher, and Jones, 4.*]

THIS was an appeal from the decision of Vice-Chancellor Stuart upon a motion for a decree, reported in the first volume of Mr. Giffard's Reports,¹ whereby his Honor directed the delivery up of certain bills of exchange, and made perpetual an injunction which had been granted, restraining the defendants from negotiating or taking any proceedings upon the bills.

The plaintiff, a cornfactor, carrying on business at Newcastle-on-Tyne, by letter dated the 12th of June, 1858, authorized O. F. Homeyer, his correspondent at Wolgast, in Prussia, to draw upon him at the Union Bank of London against a transmittal of a bill of lading of a cargo of wheat to be shipped to the plaintiff at Newcastle.

O. F. Homeyer accordingly, on the 26th of June, 1858, drew upon the plaintiff for £2,400, in six bills of exchange of £400 each, in firsts and seconds, payable to his own order at two months' date. Having indorsed the bills in blank, he enclosed them in a letter to a company at Berlin, called the Berlin Discount Company, then acting as his bankers, together with a document purporting to be a bill of lading of 8,320 scheffels (about 1,500 quarters) of wheat shipped to plaintiff at Newcastle.

The letter, which was dated 26th of June, was as follows:—

“To-day, I hand you £2,400, in six bills for £400 each, on the Union Bank of London, two months' date, firsts and seconds, requesting you to send the firsts for acceptance, and to negotiate the seconds at the most favorable exchange. At the same time, I request you will cause the enclosed bill of lading to be given up upon the acceptance in London. I further beg you will send by the first mail for my account to Messrs. Ziemsens & Wibelitz, in Stettin, thalers 4,800, and to me thalers 6,000 bank-notes, likewise by return of post.”

Upon receipt of this letter, the company forthwith sent the firsts of exchange for acceptance, together with the document purporting to be a bill of lading, to Messrs. Goldschmidt & Bischoffsheim, their agents

in London; and they, on the same day, made the remittances to or on account of Homeyer, as requested in the letter.

In the account of this transaction sent by the company to Homeyer, on the 1st of July, 1858, they deducted from the account of the bills of exchange certain charges for brokerage and expenses of acceptance, and stated that they had credited his account with the balance. These remittances to or on account of Homeyer, and a further advance to him of 3,000 thalers, the whole amounting to £2,120, or thereabouts, were, as the company stated by their answer, made entirely on the faith that the bills of exchange would be duly accepted and paid.

On the 30th June, 1858, Messrs. Goldschmidt & Bischoffsheim, on behalf of their correspondents, the Berlin Discount Company, presented to the Union Bank of London for acceptance, on account of the plaintiff, the six bills of exchange which had been sent to them by the company, and at the same time presented to and left with the Union Bank the paper purporting to be a bill of lading which had accompanied the bills of exchange.

On the following day, the Union Bank of London, believing the paper to be a genuine bill of lading, pursuant to instructions previously received from the plaintiff, accepted on his account the six bills of exchange.

On the 12th July, 1858, the plaintiff first discovered that the paper writing purporting to be a bill of lading had been forged by Homeyer, and that no wheat whatever had been shipped by him to the plaintiff.

Messrs. Goldschmidt & Bischoffsheim, by their answer, denied that they had made any representation as to the genuineness of the bill of lading on presenting the firsts of exchange for acceptance; and it was admitted that neither they nor their principals had at that time notice of the forgery.

The firsts of exchange presented for acceptance were not indorsed by the Berlin Discount Company; but the company afterwards indorsed the seconds, three of which they negotiated on the 3d of July at Berlin.

The bill sought the delivery up of the bills of exchange to be cancelled, on the ground that the plaintiff's acceptance thereof had been obtained by fraud; and an injunction to restrain the negotiation of the bills, or the prosecution of any action thereon, by the Messrs. Goldschmidt & Bischoffsheim, or the Berlin Discount Company.

Mr. Baker and *Mr. Hetherington*, for the plaintiff, in support of the Vice-Chancellor's decree.

In *Robinson v. Reynolds*,¹ relied upon by the defendants before the

¹ 2 Q. B. 196.

Vice-Chancellor, the question turned upon the form of the pleadings; and the decision is not of general application in all cases. That case differs from the present in one material respect. It was a case on a discount. There the bill of exchange was, with the forged bill of lading, handed over the counter at the bank, the money being received in exchange. The bank thus became a holder for value, and indorsed both the bill of exchange and the bill of lading. That was a discounting transaction. Not so the present. The Berlin Discount Company received the bills with a direction to send the firsts to London for acceptance with the pretended bill of lading, and to negotiate the seconds. At the same time, Homeyer, who had long been their customer, drew upon them for various sums of money, without reference either to the negotiation or discounting of the bills of exchange. The bank, pursuant to the direction, sent the firsts of exchange and bill of lading (both unindorsed by them) to London, but kept the seconds in their own possession. This transaction was not by way of discount. The bank advanced the sums upon Homeyer's drafts, not upon the credit of the bills of exchange, but upon Homeyer's credit as their customer. That this was so is shown by the charge subsequently made for brokerage by the bank, as if they had obeyed Homeyer's instructions, and commissioned a broker to discount the bills. Under these circumstances, the bank were not, it is submitted, holders for value of the bills, but merely agents of Homeyer; and their possession of the bills can give them no rights other than those of Homeyer.

The acceptance of the bills was obtained by means of a fraud practised upon the plaintiff and the Union Bank. The bills are shown to have been accepted on the faith that the document handed by the defendants, Goldschmidt & Bischoffsheim, to the acceptor at the time of, and as the consideration for, the acceptance was a valid document: a faith which resulted from the representation implied, though not expressly made by the defendants, on presentment of the bills of exchange for acceptance and delivery of the bill of lading. The defendants must have known that Homeyer had no authority to draw the bills except against the produce of the bill of lading, and that the plaintiff's acceptance was to be conditional upon his receiving a good bill of lading. The whole consideration, therefore, fails as between the defendants and the acceptor. The defendants were the channel through which a fraud had been committed upon the plaintiff; and, though they themselves were innocent of any participation in such fraud, the plaintiff is justified in refusing payment of the bills.

They referred to *Lickbarrow v. Mason*,¹ *Jones v. Ryde*.²

¹ 2 T. R. 63.

² 5 Taunt. 488.

Mr. Malins and *Mr. Ferrers*, for the defendants, in support of the appeal.

In a case circumstanced as the present, there is no defence in equity which is not equally available at law. A court of law has complete jurisdiction; and the bill ought to be dismissed. It is immaterial as regards the defendants, the Berlin Discount Company, whether this case is identical in its circumstances with *Robinson v. Reynolds*, or not. The question is, Are they holders for value of the bills in question, or not? If they are the mere agents of Homeyer, the plaintiff has a good defence upon the bills at law, and does not require the assistance of a court of equity. If, on the other hand, the defendants, the Berlin Discount Company, are holders for value, they are entitled to recover upon the bills at law, and ought not to be interfered with by injunction. Interference under such circumstances between the parties to a bill of exchange is foreign to the province of this court. If it is right to interfere in this case, any acceptor of an accommodation bill might apply to this court for an injunction, though he had a valid defence at law. This bill is, in truth, demurrable.

[THE LORD JUSTICE KNIGHT BRUCE. The bill prays the delivery up of the bills. Will the appellants undertake to deliver up the bills, if the decision at law should be against them?]

They are willing so to do, if the court should require such an undertaking. But we submit that a court of law can give complete relief, and that the plaintiff, if successful at law under such circumstances, could not be put to file a bill for the delivery up of the bills. Irrespectively of the merits, therefore, the bill should be dismissed with costs. Upon the question of merits, the case is, it is submitted, on all fours with that of *Robinson v. Reynolds*,¹ and must be governed by the same rule.

Mr. Bacon, in reply. This court has undoubtedly jurisdiction (not possessed by a court of common law) to order the delivery up of these bills; and there is no reason why, in such a case, it should not also have jurisdiction to grant an injunction.

THE LORD CHANCELLOR. I am of opinion that this injunction should not have been granted. I think that dangerous consequences would follow, and the credit of bills of exchange be very much shaken, if the title of the indorsees of bills of exchange as against the acceptor under such circumstances could be called in question. It is allowed that the case of *Robinson v. Reynolds* was well decided, that its authority has never been questioned, and that it is part of the commercial law of England. Now, the indorsee in that case was a holder *bona fide* for value;

and, on that account, the circumstances which existed there as between the acceptor and the drawer were not permitted to shake the title of the indorsee. The bills had been accepted by the drawee on the credit of the drawer, and had been, in an independent transaction, indorsed to the plaintiff, so that, as between the plaintiff and the acceptor, there was full value and an unimpeachable title. I apprehend that is precisely the case here. The banking company were indorsees *bona fide* for value. Whether it was upon a discount, or whether it was an advance of the value in any other way, seems to me wholly immaterial. They advanced money to within a trifle of the amount of the bills of exchange, and, having advanced that money, they were indorsees for value. That being so, it must be considered that the bills were accepted by Thiedemann on the credit of Homeyer; and for that reason it would be alarming if the title of the indorsees (they holding the bills *bona fide* for value) could be thus impeached.

If it had been shown that the banking company were not *bona fide* holders of the bills, an action by them against the acceptor might have been defended. But I do not find that the banking company did any thing that was not entirely sanctioned by commercial usage. They have advanced money on the faith of these bills; and they had a right to tender them for acceptance. Having obtained the acceptance, they have an undoubted right to apply the bills for their own indemnity.

THE LORD JUSTICE KNIGHT BRUCE. The appellants are holders of the bills in question for value. Neither their honesty nor the propriety of their conduct is impeached. Therefore, whatever may be the probability of success or failure at law on either side, there is, I think, no equity here, unless a case can be made out for the delivery up of the bills. This is not a demurrer. I think, therefore, that the only difficulty in the case, if there be any, will be surmounted by the undertaking which the appellants' counsel have consented to give, and which will, I suppose, be embodied in our order, that, in the event of judgment being obtained at law against the appellants, the bills shall be delivered up to the plaintiff, who, in that event, would, I presume, be the person entitled to them. That being done, I think the bill should be dismissed, with costs; but I do not think that there should be any costs of the appeal.

THE LORD JUSTICE TURNER concurred.¹

¹ In *Robinson v. Reynolds*, 2 Q. B. 196, the circumstances resembled those of the principal case, with the additional fact that the forged bill of lading transmitted to the acceptor was indorsed by the holders of the bill of exchange. In an action by the holders against the acceptors, judgment was given for the plaintiffs in the Court of Queen's Bench; and this judgment was affirmed in the Exchequer Chamber. Lord Denman, in delivering the opinion of the court, said (p. 203).

"This plea does not show that the plaintiffs made any representation which they knew to be false, nor that they warranted the bill of lading to be genuine; nor does it disclose that the defendants accepted the bill of exchange, on which the action is brought, upon the faith of any assertion by the plaintiffs, further than their indorsement upon it, that the bill of lading, which turned out to be forged, was genuine." In a similar case, *Leather v. Simpson*, L. R. 11 Eq. 398, Sir R. Malins, V. C., in pronouncing a decree against the acceptors, said (p. 403): "The claim on the part of the plaintiffs is rested upon this, that the plaintiff Beach accepted the bills on the faith of the representation made by the Union Bank of London, contained in the notes attached to the bills, 'The Union Bank of London holds bill of lading and policy for 251 bales of cotton, per "William Cummings."' It is urged that that is a representation by the bank that they hold a genuine bill of lading, and therefore that the person who is called upon to accept the bill will have the security of a document which will insure to him the delivery of 251 bales of cotton. Against that, it is said, there is no representation of genuineness, there is no guarantee. The bank do not undertake to say whether the bill of lading is good or not: they only say, 'we have a bill of lading,' the fair meaning of which may possibly be, 'we have a document which, on the face of it, is a bill of lading. Nothing had occurred to excite their suspicion: they believed it to be a bill of lading, and they therefore called it so. Then does this amount to a representation that it was a genuine bill of lading? . . . Was there, then, a guarantee by the Union Bank? It would be a very dangerous thing for a bank, if, when they say they have a document of that kind, they were to be held to guarantee its genuineness. My opinion is, they do nothing of the kind." See, to the same effect, *Hoffman v. Milwaukee Bank*, 12 Wall. 181; *Craig v. Sibbett*, 15 Pa. 240. — ED.

FOSTER v. MACKINNON.

IN THE COMMON PLEAS, JULY 5, 1869.

[Reported in Law Reports, 4 Common Pleas, 704.]

ACTION by indorsee against indorser on a bill of exchange for £3,000, drawn on the 6th of November, 1867, by one Cooper upon and accepted by one Callow, payable six months after date, and indorsed successively by Cooper, the defendant, J. P. Parker, T. A. Pooley & Co., and A. G. Pooley, to the plaintiff, who became the holder for value (having taken it in part-payment of a debt due to him from A. G. Pooley) before it became due, and without notice of any fraud.

The pleas traversed the several indorsements, and alleged that the defendant's indorsement was obtained from him by fraud.

The cause was tried before Bovill, C. J., at the last spring assizes at Guildford. The defendant, who was a gentleman far advanced in years, swore that the indorsement was not in his handwriting, and that he had never accepted nor indorsed a bill of exchange; but there was evidence that the signature was his; and Callow, who was called as a witness for the plaintiff, stated that he saw the defendant write the indorsement under the following circumstances: Callow had been secretary to a company engaged in the formation of a railway at Sandgate, in Kent, in which the defendant (who had property in the neighborhood) was interested; and the defendant had some time previously, at Callow's request, signed a guarantee for £3,000, in order to enable the company to obtain an advance of money from their bankers. Callow took the bill in question (which was drawn and indorsed by Cooper) to the defendant, and asked him to put his name on it, telling him it was a guarantee; whereupon the defendant, in the belief that he was signing a guarantee similar to that which he had before given (and out of which no liability had resulted to him), put his signature on the back of the bill immediately after that of Cooper. Callow only showed the defendant the back of the paper: it was, however, in the ordinary shape of a bill of exchange, and bore a stamp, the impress of which was visible through the paper.

The Lord Chief Justice told the jury that, if the indorsement was not the signature of the defendant, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not

guilty of any negligence in so signing the paper, he was entitled to the verdict.

The jury returned a verdict for the defendant.

Sir J. D. Coleridge, S. G., in Easter term last, obtained a rule *nisi* for a new trial, on the grounds of misdirection and that the verdict was against evidence.

Ballantine, Serjt., Brown, Q. C., and *Archibald*, showed cause. Two questions arise here: 1. Whether there was any negligence on the part of the defendant in signing the document as he did; 2. Whether, assuming Callow's evidence to be true, the defendant can be responsible upon an indorsement so fraudulently obtained. In considering the first of these questions, regard must be had to the age and condition of the party. What would be negligence in a merchant or a banker would not necessarily be negligence on the part of a gentleman of great age and impaired physical powers. Negligence must in all cases be a relative term. *Lynch v. Nurdin*.¹ Then, as to the second question. It is essential to every contract that there be volition. A man cannot be said to contract when he signs a paper upon a representation and under a belief that he is signing something different from that which it turns out to be: to make a valid and binding contract, the mind must go with the act. This arises upon the traverse of the indorsement. Upon the facts proved, the defendant cannot be said to have indorsed the bill at all. The rule which is applicable to deeds is equally applicable to bonds and to bills of exchange. *Com. Dig. Fait* (B. 2); *Thoroughgood's Case*,² and note R. referring to *Keilwey*, 70, b., pl. 6; *Swan v. North British Australasian Company*; ³ *Polhill v. Walter*.⁴ Where a man puts his name as acceptor or indorser on a blank stamp, he becomes responsible, if the bill is afterwards filled up and gets into the hands of a *bona fide* holder for value, to the full amount which the stamp will cover: *Russel v. Langstaffe*, *Montague v. Perkins*; *Byles on Bills*, 9th ed. 181; but in such case he intends to become a party to the bill. All the cases in which one who has been defrauded has been held liable upon the bill or note are explainable on the ground of agency. *Byles on Bills*, 9th ed. 131. *Young v. Grote* may be sustained on that ground. But the fact of agency must be first established. *Awde v. Dixon*, *Kingsford v. Merry*.⁵ In *Ingham v. Primrose*, the defendant had once made a complete bill, and the ground of the decision was that he had negligently omitted to cancel or destroy it effectually.

Sir J. D. Coleridge, S. G., *Sir G. Honyman, Q. C.*, and *Talfourd*

¹ 1 Q. B. 29.

² 2 Co. Rep. 9, b.

³ 2 H. & C. 175.

⁴ 3 B. & Ad. 114.

⁵ 11 Ex. 577; in error, 1 H. & N. 503.

Salter, in support of the rule. The fact that the defendant's indorsement on the bill was obtained by a fraudulent representation that he was signing something else is no answer to the claim of a *bona fide* holder for value, without notice of the fraud. No doubt, as a general rule, fraud vitiates all contracts. But a bill of exchange is not in the ordinary sense of the word a contract at all. The law-merchant imposes certain obligations on parties who put their names on bills of exchange, — obligations altogether apart from the ordinary obligations arising out of other contracts. Bills of exchange now form an important part of the currency of the country. No matter how a bill or note may be tainted with fraud, or even if it has been obtained by duress or by felony, that is no answer to an action at the suit of a *bona fide* holder for value. Bayley on Bills, 472, 473, 534; Chitty on Bills, 10th ed., 50, 53, 178; Byles on Bills, 8th ed., 57; *Duncan v. Scott*, *Marston v. Allen*, *Harvey v. Towers*;¹ *Parsons on Bills*, ed. 1865, pp. 109–115, citing, amongst other cases, *Putnam v. Sullivan*,² where *Parsons, C. J.*, says: “The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which the distinction ought to prevail; as, where a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect or misplaced confidence in others.” In *Rex v. Hales*,³ the prisoner had got from a member of parliament named Gibson a blank frank, which he subsequently, by writing over the signature and altering the word “free” into “for” and adding “myself and partners,” turned into a promissory note for £2,600; and, though the most eminent counsel of the day were retained to defend him, it did not occur to any of them that the then necessary allegation in the indictment of the intent to defraud Gibson failed in proof, which it would have done if the argument urged here is well founded, viz., that Gibson was not liable on the note, and therefore could not be defrauded. So, in *Rex v. Revett*,⁴ A. by false representations induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for £100, and

¹ 6 Ex. 656³ 17 How. St. Tr. 161.² 4 Mass. 45.⁴ Byles on Bills, 8th ed. 124.

induced C. to advance him £100 upon it. A. was indicted for defrauding C.; and it was held that C. had his remedy against B. on the note, and that the fraud therefore not being upon C., but upon B., the indictment was not sustained by the evidence. Wherever there is consideration, fraud may be disregarded. If a stolen bill gets into circulation, the acceptor is liable at the suit of a *bona fide* holder for value. That is asserted in *Ingham v. Primrose*. *Awde v. Dixon* is like *Stagg v. Elliott*.¹ This was not a case of forgery: it was a mere fraudulent procurement of the defendant's signature to a genuine and a complete bill. *Thoroughgood's Case*² is peculiar, and not very intelligible; and in the case cited from *Keilwey*, 76, b., the deed was fraudulently read by the grantee himself.

[BRETT, J. *Nance v. Lary*,³ cited in *Parsons on Bills*, 114, seems to be very much to the purpose. In that case, the defendant and one Langford being about to execute a bond in blank, the latter produced a sheet of paper, upon which the defendant signed his name; whereupon Langford suggested that the signature was so far from the bottom of the paper that there might not be room for the bond to be written above it, and produced another sheet for the defendant to sign so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had been or would be destroyed. Subsequently, Langford caused the note upon which the present suit was brought to be written over the blank signature of the defendant retained by him, and negotiated it to the plaintiff. Collier, C. J., said: "The making of the note by Langford was not a mere fraud upon the defendant; it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signature. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction."]

In that case, the defendant never intended to sign the instrument at all. Byles, J., in his judgment in *Swan v. North British Australasian Company*,⁴ in the Exchequer Chamber, says: "The object of the law-merchant as to bills and notes made or become payable to bearer is to secure their circulation as money; therefore honest acquisition confers

¹ 12 C. B. (N. S.) 373.

³ 5 Ala. 370.

² 2 Co. Rep. 9, b.

⁴ 2 H. & C. at p. 184.

title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction, being a forgery, would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed, within the limits of the stamp; and in America, where there are no stamp-laws, to any sum whatever. Negligence in the maker of an instrument payable to bearer makes no difference in his liability to an honest holder for value: the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay."

[BYLES, J. If that be right, it can only be with reference to the case of a complete instrument: it can hardly be applicable to a case where a man's signature has been obtained by a fraudulent representation to a document which he never intended to sign.]

Then, the verdict was clearly against the weight of evidence upon the question of negligence. Can it be said that it was any other than gross negligence on the part of the defendant to put his name upon the back of a document such as that described, without even looking at the face of it. If any one is to suffer from his misplaced confidence in Callow, it surely must be the defendant himself.

Cur. adv. vult.

July 5. The judgment of the court (Bovill, C. J., Byles, Keating, and Montague Smith, JJ.) was delivered by

BYLES, J. This was an action by the plaintiff as indorsee of a bill of exchange for £3,000, against the defendant as indorser. The defendant by one of his pleas traversed the indorsement and by another alleged that the defendant's indorsement was obtained from him by fraud. The plaintiff was a holder for value before maturity, and without notice of any fraud.

There was contradictory evidence as to whether the indorsement was the defendant's signature at all; but, according to the evidence of one Callow, the acceptor of the bill, who was called as a witness for the plaintiff, he, Callow, produced the bill to the defendant, a gentleman advanced in life, for him to put his signature on the back, after that of one Cooper, who was payee of the bill and first indorser, Callow not saying that it was a bill, and telling the defendant that the instrument was a guarantee. The defendant did not see the face of the bill at all. But the bill was of the usual shape, and bore a stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper's, he the defendant (as the witness stated) believing the document to be a guarantee only.

The Lord Chief Justice told the jury that, if the indorsement was

not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to the verdict. The jury found for the defendant.

A rule *nisi* was obtained for a new trial : first, on the ground of misdirection in the latter part of the summing-up ; and, secondly, on the ground that the verdict was against the evidence.

As to the first branch of the rule, it seems to us that the question arises on the traverse of the indorsement. The case presented by the defendant is, that he never made the contract declared on ; that he never saw the face of the bill ; that the purport of the contract was fraudulently misdescribed to him ; that, when he signed one thing, he was told and believed that he was signing another and an entirely different thing ; and that his mind never went with his act.

It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs ; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature ; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

The authorities appear to us to support this view of the law. In *Thoroughgood's Case*,¹ it was held that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. In a note to *Thoroughgood's Case*, in *Fraser's* edition of *Coke's Reports*, it is suggested that the doctrine is not confined to the condition of an illiterate grantor ; and a case in *Keilwey's Reports*² is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defrauding party. But the position that, if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities :

¹ 2 Co. Rep. 9, b.

² Keilw. 70, pl. 6.

see Com. Dig. Fait (B. 2); and is recognized by Bayley, B., and the Court of Exchequer, in the case of *Edwards v. Brown*.¹ Accordingly, it has recently been decided in the Exchequer Chamber that, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor. *Swan v. North British Australasian Land Company*.²

These cases apply to deeds; but the principle is equally applicable to other written contracts. Nevertheless, this principle, when applied to negotiable instruments, must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill-stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover.

In these cases, however, the party signing knows what he is doing: the indorser intended to indorse, and the acceptor intended to accept, a bill of exchange to be thereafter filled up, leaving the amount, the date, the maturity, and the other parties to the bill undetermined.

But, in the case now under consideration, the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the fly-leaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of that genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case, the signer would not have been bound by his signature,

¹ 1 C. & J. 312.

² 2 H. & C. 175.

for two reasons: first, that he never in fact signed the writing declared on; and, secondly, that he never intended to sign any such contract.

In the present case, the first reason does not apply, but the second reason does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the actual contents of the instrument.

We are not aware of any case in which the precise question now before us has arisen on bills of exchange or promissory notes, or been judicially discussed. In the case of *Ingham v. Primrose*, and the case of *Nance v. Lary*,¹ both cited by the plaintiff, the facts were very different from those of the case before us, and have but a remote bearing on the question. But, in *Putnam v. Sullivan*, an American case, reported in 4 Mass. 45, and cited in *Parsons on Bills of Exchange*, vol. i. p. 111, n., a distinction is taken by Chief Justice Parsons between a case where an indorser intended to indorse such a note as he actually indorsed, being induced by fraud to indorse it, and a case where he intended to indorse a different note and for a different purpose. And the court intimated an opinion that, even in such a case as that, a distinction might prevail and protect the indorsee.

The distinction in the case now under consideration is a much plainer one; for, on this branch of the rule, we are to assume that the indorser never intended to indorse at all, but to sign a contract of an entirely different nature.

For these reasons, we think the direction of the Lord Chief Justice was right.

With respect, however, to the second branch of the rule, we are of opinion that the case should undergo further investigation. We abstain from giving our reasons for this part of our decision only lest they should prejudice either party on a second inquiry.

The rule, therefore, will be made absolute for a new trial.

*Rule absolute.*²

¹ 5 Ala. 370.

² See *Detwiler v. Bish*, 44 Ind. 70; *Gibbs v. Linaburg*, 22 Mich. 479; *Anderson v. Walter*, 34 Mich. 113; *Briggs v. Ewart*, 51 Mo. 245; *Martin v. Smylee*, 55 Mo. 577; *Whitney v. Snyder*, 2 Lans. 477; *Fenton v. Robinson*, 4 Hun, 252; 6 Th. & C. 427, s. c.; *DeCamp v. Hamma*, 29 Oh. St. 467; *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, 29 Wis. 626; *Butler v. Carns*, 37 Wis. 61; *Griffiths v. Kellogg*, 39 Wis. 290, in which cases the defendants, having been guilty of no negligence, were not liable to an innocent holder for value. See also the Illinois decisions, cited *supra*, p. 416, n. 2.

Conf. Leach v. Nichols, 55 Ill. 273; *Mead v. Munson*, 60 Ill. 49; *Swannell v.*

HOGARTH v. LATHAM & Co.

IN THE COURT OF APPEAL, FEBRUARY 1, 1878.

[Reported in 3 Queen's Bench Division, 643.]

ACTION on two bills of exchange by indorsee against acceptors.

At the trial before Hawkins, J., the following facts were proved. The plaintiff carried on the business of provision merchant in London in partnership with Cotton, under the name of Hogarth & Cotton. The defendants were shipbrokers at Dover, the members of the firm being Forster & Latham. Before February, 1876, Cotton borrowed of the plaintiff on his private account sums amounting to £3,000. Before the 15th of February the plaintiff pressed Cotton for repayment of the loan, and Cotton thereupon promised to give the plaintiff two bills of exchange, to be accepted by the defendants, which he stated he should very shortly receive, and further stated, in answer to the plaintiff, that the consideration for the bills was for coals supplied for the use of the steamship *Castalia*; the plaintiff, knowing that Cotton was connected with the steamship company that owned the *Castalia*, accepted this explanation. On the 15th of February Cotton sent the bills sued on to the plaintiff; they purported to be accepted by Latham & Co.; the bills were in every respect perfect except the drawer's name was blank. The body of the bills was in Cotton's handwriting, they were at three months' date, and were drawn "pay to our order:" the acceptance was in Forster's handwriting. It was admitted that he had no actual authority to accept bills in the name of the firm. Cotton stated to the plaintiff that he had arranged with Latham & Co. that the bills might be drawn in the name of Hogarth & Cotton, in order that the plaintiff might the more readily discount them with his bankers. In May, before the bills became due, the plaintiff filled in the names of Hogarth & Cotton as drawers and indorsees, and his own name as indorsee. The bills fell due on the 18th of May, but were not presented at the request of Cotton. From the month of May to July, Cotton paid to the plaintiff sums of money from time to time on account of the bills. On the 3rd of August Cotton absconded, and a few days later Forster also disappeared. It was admitted that the plaintiff had given value for the bills. There was no evidence of a general usage to draw bills in blank, but there was some evidence that in mercantile transactions it was frequently done, and that it was usual not to fill up the blank until the bill was wanted to be discounted or presented.

The jury found that the plaintiff, when he received the bills from Cotton, took them *bona fide*, believing them to be perfectly good bills, but afterwards, and at the time he filled in the names of Hogarth & Cotton, suspected that there was something wrong.

The learned judge directed judgment to be entered for the defendant Latham.

The plaintiff appealed.

Jan. 31; Feb. 1. *Cohen, Q. C.*, and *R. M. Bray*, for the plaintiff. *McIntyre, Q. C.*, and *Wheeler*, for the defendant, Latham.

The arguments are sufficiently stated in the judgments hereinafter set forth; the following cases were cited: *Snaith v. Mingay*; ¹ *Cruchley v. Clarence*; ² *Attwood v. Griffin*.³

BRAMWELL, L.J. I think that the judgment must be affirmed. With the exception of *Chemung Canal Bank v. Bradner* ⁴ and a case which I tried at the last Chester assizes, I have never heard of an action such as this. The facts of the case at the Chester assizes were almost identical with the present; there, however, the firm who purported to accept the bill were really indebted to the person to whom it was sent, and if the bill had been drawn by the creditor upon the defendants in that action it would have bound them, as it was a bill for value, and the partner who sent it would have had authority to forward it; but as it was drawn in blank and sent to the creditor who handed it to the plaintiff in the action, who filled it up, not with the creditor's name but with his own, I ruled that it was not a mercantile business transaction and that it was not within the authority of the partner to bind the firm. This is a weaker case, because as it must be assumed, no debt was due from the defendant's firm to Cotton, and I am of opinion that it was not a mercantile business transaction and was not within the presumable authority of the partner Forster. Anybody who takes such an instrument as this, knowing that when it was accepted the bill had not the name of any drawer upon it, takes it at his peril and must show that in fact the partner who did not write the acceptance authorized the attaching of the partnership name to the document with intent that it should be filled up by any person who got it. Mr. Bray has told us that we shall put a restriction upon the circulation of bills of exchange, if we decide against the plaintiff. I think, on the contrary, that we shall be laying down a good rule, which will protect honest traders against the acts of their fraudulent partners. Mr. Bray said that if one member of a firm drew a cheque on a bank payable to A. in respect of a debt due to B., he would be exceeding his partnership authority. As between the bank and the

¹ 1 M. & S. 87.

² 2 M. & S. 90.

³ R. & M. 425; 2 C. & P. 363.

⁴ 44 New York Rep. 5 Hand. 680.

partners he would not, because the bank could not tell that it was so. Then Mr. Bray ingeniously said, supposing the holder of the cheque brought an action, could not he maintain it although the partnership authority had been exceeded? As to that I should like to take time to consider the point, when the case arises. I am not prepared to say that if A. and B. owe a debt to C., one partner without the authority of the other has any right to make the cheque payable to D., at all events without something to show that it has been given in satisfaction of C.'s debt. I should not like to lay down a rule upon this point. I can imagine cases, where it would be monstrous to hold that the firm were not liable, if it really turned out that there was a debt due to C., and that C.'s debt would be satisfied on payment of the cheque. I should be very unwilling to hold that such a document as that was not within the partnership authority, and I should be very unwilling to hold that if the firm of A. and B. owed C. a sum of money, and a bill was accepted in blank by one of the partners and sent to C., and C. put his name in as the drawer, the other partner was not bound, though he did not know of it and had given no special authority for its being done. But it would be a perfectly immaterial question if the bill passed into the hands of a *bona fide* holder; in that case the firm would be liable. If it remained in the hands of the drawer, if the debt was due to him, it would matter very little whether he could recover on the bill of exchange, because the debt was due to him. I say nothing about that, but in this case in point of fact no debt was due to Cotton, although the plaintiff may have supposed otherwise owing to Cotton's statement. A bill of exchange supposes value, and is a negotiable instrument; but I am not at all sure that a man who takes what is not a negotiable instrument has a right to presume any value, or that he does not take it at his peril if there is no value. But supposing that the plaintiff had a right to assume value between Cotton and the defendant's firm, yet since the acceptance was in the handwriting of one partner only, I am of opinion that he had not as against the other partner and as matter of right the power of putting in his name as the drawer, he not being the creditor; and that as he did put in the name of his firm as drawers, he must show that the partner whose writing is not on the bill authorized his partner to put that document into circulation and gave authority to any holder to put in his name as drawer. I am of opinion that there was no evidence of partnership authority here — certainly none in point of law. Evidence was given that it was a common practice for persons to accept bills of exchange in blank and remit them to their creditors. I dare say it may sometimes happen that a tradesman may write his acceptance across a piece of paper and send it to a wholesale dealer for the amount of the debt that is

due to him, but with the intention that the creditor shall put his own name and not anybody's else; and with very great respect to the judges who decided the case of *Harvey v. Cane*¹, I should doubt very much whether in such a case as that anybody else who puts his name does not put it at the peril of having to show that the acceptor of the bill gave him authority to do it. It is one thing to authorize a creditor to put his name into a bill, and it is another thing to authorize him to insert the name of a third person. I cannot help referring to *Awde v. Dixon*.² Baron Parke there says (p. 872): "I do not gainsay the position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. Here the instrument to which the defendant's name is attached is delivered to his brother with power to make it a complete instrument on one condition only — that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority where, in case of a refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is 'nemo plus juris in alium transferre potest quam ipse habet.' It is a fallacy to say that the plaintiff is a *bona fide* holder of value, he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother and he had no authority; consequently the instrument is void as against the defendant." This reasoning is applicable here, and to my mind there is no reason why the plaintiff should recover, and there are reasons why he should not.

It was said by Mr. Cohen that this was a negotiable instrument even before the holder's name was put into it. I am of opinion that it was not, and that the cases do not show that it was. *Harvey v. Cane*³ has been relied upon, but that case wholly differs from the present, for there was only one acceptor who himself accepted in blank. There are, however, some cases that show that an incomplete instrument may be made complete by a person to whom it was not originally handed, not on the ground that it was a negotiable instrument, but on the ground that the defendant, when he parted with it,

¹ 34 L. T. (N. S.) 64.² 6 Exch. 869.³ 34 L. T. (N. S.) 64.

must be taken to have given authority to any one into whose hands it might come to fill up the blank. It is not, therefore, a negotiable instrument, but authority has been given to every *bona fide* holder into whose hands it may come to make it a perfect instrument.

But the answer to that argument is that, before the plaintiff purported to exercise the supposed authority, he knew, not indeed that it was revoked, but that it never existed. A presumable authority exists in a partner of a trading firm to bind his partner by an acceptance. If I go to a man and say, "There is no such authority between me and my partner," he may draw a bill of exchange upon the firm; but he can maintain no action against me upon it, although accepted by my partner. The result follows not upon the ground of the authority being revoked, but upon the ground of his knowing that the presumable authority does not exist. In like manner the plaintiff before he filled up this instrument knew the presumable authority, or rather presumable power in the partner to give him the authority, did not exist; and therefore he knew that he himself had no authority.

As I am adverse to the plaintiff upon the point which I have mentioned, it is unnecessary to consider whether, if he had filled the instrument up at the time of receiving it, he might have made it a binding instrument, and he would have had a right to suppose that Forster had power to bind the defendant, his partner, and that he had himself had authority to fill up the bill. But I may say that although it may seem a little hard upon him perhaps that he should be worse off because he did at a later period that which he might have done at an earlier period, yet as he did not fill in the bill at the time when he might possibly have supposed he had authority to do it, he could not fill it in after he had received information which aroused his suspicions.

It has been said that if this bill got into the hands of a *bona fide* holder, that is, if Hogarth had indorsed it to a *bona fide* holder, the *bona fide* holder could have maintained an action. I am inclined to think that this argument is right for this reason — A partner in such a firm as this has power to accept a bill of exchange; a *bona fide* holder would have taken what upon the face of it would have been a perfect bill of exchange, and the defendant could not say to him, as he says here to the plaintiff: "You knew as a fact that it was a question whether there was actual authority to do this, and not a presumable authority." The *bona fide* holder would be entitled to say, "I have given credit to the partnership signature to an instrument valid upon the face of it, and I am entitled to recover." The difference between that case and the present case is this, that there the holder would not have had the notice which the plaintiff had upon this occasion.

I think that the judgment was right, and I think so without imput-

ing any fraud to the plaintiff in this matter. To some extent it may be a hard case upon him. If he had not had this piece of paper which he thought he might fill up, he would possibly have pressed his remedies against Cotton all the more; but in my judgment our decision should be in favor of the defendant.¹

BAXENDALE v. BENNETT.

IN THE COURT OF APPEALS, JULY 2, 1878.

[*Reported in 3 Queen's Bench Division, 525.*]

ACTION commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for £50, drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest.²

BRAMWELL, L. J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been

¹ Brett and Cotton, L. JJ., delivered concurring opinions. Brett, L. J., said: "Even if we assume all the cases to have been correctly decided and to bear out the propositions for which they have been cited, none of them go the length necessary to support the plaintiff's intention, for even if I have to agree entirely with the case of *Harvey v. Cane*, it does not go that length. That is all that it is necessary to say now, and I reserve to myself the power of considering whether or not that case was rightly decided, whenever the question comes before us. Even *Chemung Canal Bank v. Bradner*,³ does not go this length, because there at the time the blank was filled in there was no evidence of knowledge that there was no authority to fill in the name. It seems to me to be contrary to every rule of law as to principal and agent and to every rule of mercantile law, to suppose that this plaintiff had the right to assume that Hogarth & Cotton could be lawfully made the drawers of the bill. They were not the drawers of the bill. The plaintiff had no right to assume that they were, and therefore he cannot rely upon the drawing of the bill.

The acceptance of the bill was not authorized either expressly or impliedly by Latham. It was not an acceptance which Forster was entitled to give in respect of a partnership transaction, for there was none. Therefore neither expressly nor impliedly did Latham authorize Forster to write this acceptance.

Then comes the question whether the plaintiff, even supposing he was otherwise entitled to succeed, had a right to assume, contrary to the fact, that this acceptance was authorized by Latham. Now until a custom of merchants is proved, and proved so satisfactorily that the court may afterwards take notice of it, to the effect that it is an ordinary transaction for one partner to draft an acceptance in blank and to deliver it, so that any person who takes it may have a right to fill up the drawer's name, I shall agree with Lord Justice Bramwell in what he held at Chester, that an instrument thus drawn is invalid. — ED.

² The statement of facts and the arguments of counsel have been omitted, being substantially reproduced in the opinion of the court. — ED.

³ 44 New York Rep. (5 Hand) 680.

drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name), without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not: but what I wish to point out is, that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank check, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a check or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of *Young v. Grote* and *Ingham v. Primrose* go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real

distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the *Bank of Ireland v. Evans' Trustees*,¹ shows under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT, L. J. In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L. J., says that the defendant is not liable, because if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank, is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up; he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but

¹ 5 H. L. Cas. 889.

whether the acceptor of a bank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case, it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: the defendant accepts a bill and puts it into his drawer, it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in *Swan v. North British Australasian Company*,¹ there must be the neglect of some duty owing to some person — here how can the defendant be negligent who owes no duty to anybody — against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room; to say that was a want of due care is impossible; it was not negligence for two reasons; first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act.

As to the authorities that have been cited: in *Schultz v. Astley*,² the blank acceptance had been filled up by a stranger and a fraud had been committed; nevertheless, the acceptor was held to be liable. There, however, the acceptance had been issued, and it was intended that it should be filled up by some one; but Crompton, J., in *Stoessiger v. South-Eastern Railway Co.*³ said that case had gone to the utmost extent of the law. I do not think that the doctrine there laid down ought to be extended. In *Ingham v. Primrose*, the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street; they were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because, said the court, although he did intend to cancel it, yet he did not cancel it. It seems to me to be difficult to support that case, and the correct mode of dealing with it is to say

¹ 2 H. & C. 175.

² 4 Bing. N. C. 544.

³ 3 E. & B. at p. 556.

we do not agree with it. In *Young v. Grote*, Young left a blank check with his wife, and in filling up the check for fifty pounds the word fifty was written in the middle of the line, ample space being left for the insertion of other words. By a forgery, before the word fifty, the words "three hundred and" were inserted. Notwithstanding the forgery, the court held Young liable. It is said that the case may be upheld on the ground that Young owed a duty to his own bankers, and that he was guilty of negligence in not drawing his checks on them with ordinary care, but that case does not govern the present, it only applies to cases between bankers and mere customers. In *Bank of Ireland v. Evans' Charity Trustees*,¹ Parke, B., in delivering the opinion of the judges in the House of Lords remarks, with reference to *Young v. Grote*: "In that case it was held to have been the fault of the drawer of the check that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the check, which admitted of easy interpolation, and consequently that the drawer, having thus forced the banker to pay the forged check, by his own neglect in the mode of drawing the check itself, could not complain of that payment." He then gives instances in which a person would not be liable and which govern the present case. "If a man should lose his check-book or neglect to lock his desk in which it is kept, and a servant or stranger should take it, it is impossible, in our opinion, to contend that a banker paying his forged check would be enabled to charge his customer with that payment. Would it be contended that, if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale and so be disentitled to sue for their conversion on a demand and refusal?" Lord Cranworth, speaking of *Young v. Grote*, says that case went upon the ground, whether correctly arrived at in point of fact is immaterial, that in order to make negligence a good answer there must be something that amounts to an estoppel or ratification — "that the plaintiff was estopped from saying that he did not sign the check," and then he says the doctrine of ratification is well illustrated by *Coles v. Bank of England*.² I think the observations made by the Lords in the case of *Bank of Ireland v. Evans' Charity Trustees*,³ have shaken *Young v. Grote* and *Coles v. Bank of England*,² as authorities. In the present case, I think there was no estoppel, no ratification, and no negligence, and that the defendant is entitled to our judgment.

BAGGALLAY, L. J., concurred that the judgment ought to be entered for the defendant.

Judgment for the defendant.

¹ 5 H. L. Cas. 389.

² 10 A. & E. 487.

³ 5 H. L. Cas. 389.

WILSON AND FRASER v. NISBET OF CRAIGENTINNY.

IN THE COURT OF SESSION, SCOTLAND, FEBRUARY 24, 1736.

[Reported in *Morison*, 1509.]

A BILL was alleged to have been elicited, without any onerous cause, by the drawer, after having intoxicated the acceptor with liquor, so that he was insensible, and incapable of knowing what he was doing. This defence was not sustained against an onerous indorsee; although it was pleaded that force and fear, and such like real exceptions, are sustained against onerous indorsees. The answer was, that drunkenness is but a temporary incapacity, which ought not to be regarded, especially as it was the acceptor's own fault.¹

¹ Northam v. La Touche, 4 C. & P. 140, 145 (*semble*); State Bank v. McCoy, 69 Pa. 204, *accord*.

See Miller v. Finley, 26 Mich. 249.

In *Matthews v. Baxter*, L. R. 8 Ex. 132, the contract of a man too drunk to know what he was about was so far assimilated to the contract of an infant as to be held capable of ratification after he became sober. It seems clear, however, that in this case, as well as in the principal case, the courts lost sight of a fundamental distinction between express or actual contracts, and implied or *quasi* contracts. This distinction was very clearly stated by Pollock, C. B., in *Gore v. Gibson*, 13 M. & W. 623, 625. "With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between 'express' and 'implied' contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title."

See also, as opposed to *Matthews v. Baxter*, *supra*, *Berkley v. Cannon*, 4 Rich. 136.

In some jurisdictions, the contracts of habitual drunkards, although made during a sober interval, are declared void by statute. See *McCrillis v. Bartlett*, 8 N. H. 569; *Wadsworth v. Sharpsteen*, 4 Seld. 388; *Clark v. Caldwell*, 6 Watts, 139. — ED.

ALEXANDER PAGAN AND JAMES^r HUNTER v. ALEXANDER WYLIE.

IN THE COURT OF SESSION, SCOTLAND, JUNE 19, 1793.

[Reported in *Morison*, 1660.]

A HOLOGRAPH bill drawn by John March, after being accepted by James Hunter, and indorsed by Alexander Pagan, was put into the hands of the drawer, in order to raise money on it, who, there was reason to believe, taking advantage of a blank in the body of the bill, fraudulently altered its amount from eight to eighty-four pounds sterling, by adding the letter “y” to the end of the word “eight,” and the word “four” immediately after it.

The part thus added had rather a crowded appearance, and seemed to be written with different ink, but in the same hand with the rest of the bill.

After this operation, March discounted the bill for its full value with Alexander Wylie, agent at Dumfries for the Paisley Union Bank.

Before the bill became due, March had fled the country.

Wylie having charged Hunter and Pagan for payment of the £84, they obtained a suspension, and the Lord Ordinary afterwards reported the cause, on informations.

The arguments of the bar were in a great measure confined to the special circumstances of the case. In particular, the charger endeavored to establish that Hunter and Pagan had been in the practice of intrusting March with bills, blank in the sum, leaving him to fill it up as occasion should require; and from that, and a variety of other specialties, he contended that they were liable for the full sum for which he had *bona fide* discounted it.

The suspenders endeavored to obviate the conclusions drawn from these facts, and at the same time to assimilate the fraudulent interpolation to the case of forgery or vitiation; and thence they argued: 1. That the alteration being a *vitium reale*, the bill could not be sustained as a document of debt; 2. That, as the alteration was visible, Wylie was equally negligent in not discovering it, as they were in putting their names to a bill with a blank *in gremio*; and that therefore both parties being *in pari casu*, where the loss had fallen, there it must remain.

The court, waiving the specialties which occurred in the cause, went upon the following grounds. Where a blank is left in a bill, suffi-

cient to admit the insertion of part of one word and the whole of another, as in the present case, any person who puts his name upon it, whether as drawer, acceptor, or indorser, and trusts it in the hands of another, and particularly of the person by whom it was written, in order to its being passed by him into the circle, must be liable for the consequences, in the same manner as if it had been left blank in the sum altogether, it being nearly the same thing, whether the blank be total or partial. And although, upon a narrow inspection, a small crowding of the letters, and some little difference in the color of the ink, might have been perceived, both were too trifling to put the discounter on his guard: even if he had hesitated, and made inquiry into these circumstances, he might have been told, without putting him *in mala fide*, that there had been originally a blank left, in order to be filled up with the sum which might be wanted. The circumstance of leaving a blank must be held as a tacit mandate from the parties whose names were upon the bill, intrusting the holder with the power of filling it up; and therefore the present case differs widely from a forgery or vitiation, for there one writing is converted into another, without the consent of the parties, either express or implied.

The Lords unanimously “repelled the reasons of suspension.”¹

¹ *Graham v. Gillespie* (Court of Session), Jan. 27, 1795; *Yocum v. Smith*, 63 Ill. 321; *Blakey v. Johnson*, 13 Bush, 197; *Isnard v. Torres*, 10 La. An. 103; *Redlich v. Doll*, 54 N. Y. 234, 239 (*semble*); *Garrard v. Haddan*, 67 Pa. 82, *accord*.

Knoxville Bank v. Clark, 9 C. L. J. 29 (Iowa, June, 1879); *Bradley v. Mann*, 37 Mich. 1; *Greenfield Bank v. Stowell*, 123 Mass. 196; *Worrall v. Gheen*, 39 Pa. 388 (explained in *Garrard v. Haddan*, *supra*), *contra*.

See also *Hanbury v. Lovett*, 18 L. T. Rep. 366; *Société Générale v. Metropolitan Bank*, 27 L. T. Rep. 849; 21 W. R. 335, s. c.; *Wade v. Withington*, 1 All. 561; *Goodman v. Eastman*, 4 N. H. 555. — ED

MOSES F. PEASLEE v. JOHN D. ROBBINS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER
TERM, 1841.

[*Reported in 3 Metcalf, 164.*]

ASSUMPSIT on a promissory note made by the defendant to Benjamin Parker or order, and by him indorsed in blank.

At the trial in the Court of Common Pleas, before Strong, J., the defendant introduced evidence tending to prove that Parker, when he indorsed the note, had not sufficient mental capacity to make a valid transfer thereof. Evidence was given as to his incapacity at the time when the note was made to him, as well as after, and tended to prove that he was not competent to make a contract, either at that time or since. The plaintiff objected to the introduction of evidence as to Parker's incompetency to contract when he received the note; but the objection was overruled.

The defendant gave evidence that Parker was put under guardianship, as an insane person, on the 20th of November, 1838, and also evidence tending to show that the note was indorsed by him after that time. A witness testified that the plaintiff told him, about the 1st of March, 1840, that he purchased the note about three months before; and the jury were instructed that this testimony, if believed by them, raised a presumption that the plaintiff purchased the note immediately of Parker, but that such presumption might be controlled by the other evidence in the case.

The jury found a verdict for the defendant; and the plaintiff alleged exceptions to the ruling and instructions of the judge.

L. Williams and *G. Parker*, for the plaintiff.

Farley, for the defendant.

WILDE, J. It is quite clear, we think, that the evidence, to which the defendant objected at the trial in the court below, was material to the issue and rightly admitted, and that the instructions to the jury were correct.

The plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows, as a necessary consequence, that the defendant must be allowed to impeach the plaintiff's title to the note, by showing that the indorsement was void. Evidence, therefore, of the indorser's mental incapacity to make a valid contract at the time he indorsed the note, was material evidence; and not the less material because the same incapacity existed when the note was

signed. All the evidence of the indorser's incapacity, before and after the indorsement, was properly submitted to the jury, to enable them to decide correctly on the question of his incapacity at the time of the indorsement.

Then, as to the instructions to the jury, it is objected that there was no evidence authorizing the presumption that the plaintiff purchased the note immediately of Parker, the note being indorsed in blank. But the plaintiff could not maintain his action without filling up the blank with an order making the note payable to himself; and, if he declared on the note, he must have averred that Parker ordered it to be paid accordingly. There was, therefore, *prima facie* evidence that the note was so transferred. If it were material, the defendant [plaintiff?] might have disproved the fact by calling the person of whom he purchased the note as a witness; and so it was held by the court at the trial, the jury having been instructed that the presumptive evidence of the transfer was not conclusive. *Exceptions overruled.*¹



JOHN HORTSMAN, PLAINTIFF IN ERROR, v. JOHN HENSHAW, WILLIAM WARD, AND JOSEPH W. WARD, MERCHANTS AND COPARTNERS, DOING BUSINESS UNDER THE FIRM AND STYLE OF HENSHAW, WARD, & CO., DEFENDANTS IN ERROR.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1850.

[Reported in 18 Curtis, 590; 11 Howard, 177.]

ERROR to the Circuit Court of the United States for the district of Massachusetts. The case is stated in the opinion of the court.

Fletcher Webster, for the plaintiff.

Edward Curtis and *Whiting*, contra.

TANEY, C. J., delivered the opinion of the court.

The material facts in this case may be stated in a few words.

Fiske & Bradford, a mercantile firm in Boston, drew their bill of exchange upon Hortsman, of London, payable at sixty days' sight to the order of Fiske & Briggs, for six hundred and forty-two pounds sterling. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error *bona fide* and for full value. They transmitted it to their correspondent in London, and,

¹ *Hannahs v. Sheldon*, 20 Mich. 278; *Burke v. Allen*, 29 N. H. 106, *accord*.

Carrier v. Sears, 4 All. 336, *contra*. See *Alcock v. Alcock*, 3 M. & G. 268. — Ed.

upon presentation, it was accepted by the drawee, and duly paid at maturity. The payees and indorsees all resided in Boston, where the bill was drawn and negotiated.

It turned out that the indorsement of the payees was forged, — by whom, does not appear; and a few months after the bill was paid, the drawers failed, and became insolvent. The drawee, having discovered the forgery, brought this action against the defendants in error to recover back the money he had paid them.

The precise question which this case presents does not appear to have arisen in the English courts; nor in any of the courts of this country, with the exception of a single case, to which we shall hereafter more particularly refer. But the established principles of commercial law in relation to bills of exchange leave no difficulty in deciding the question.

The general rule undoubtedly is that the drawee, by accepting the bill, admits the handwriting of the drawer, but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And, if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it.

The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And, if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer.

But in this case the bill was put in circulation by the drawers, with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And, if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor, who paid the bill. For, having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order.

Now, the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring the contrary in a suit brought against him by the holder. The

rights of the parties are therefore to be determined as if this bill was paid by Hortsman out of the money of Fiske & Bradford in his hands. And, as Fiske & Bradford were liable to the defendants in error, they are entitled to retain the money they have thus received.

We take the rule to be this: Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot upon that ground defend himself against a *bona fide* indorsee. The insolvency of the drawer can make no difference in the rights and legal liabilities of the parties.

The English cases most analogous to this are those in which the names of the drawers or payees were fictitious, and the indorsement written by the maker of the bill. And in such cases it has been held that the acceptor is liable, although, as the payees were fictitious persons, their handwriting of course could not be proved by the holder. *Cooper v. Meyer*. The American case to which we referred is that of *Meacher v. Fort*.¹ The same question now before the court arose in that case, and was decided in conformity with this opinion.

Another question was raised in the argument upon the sufficiency of the notice; and it was insisted by the counsel for the defendants that, if they could have been made liable to this action by the plaintiff, they have been discharged by his laches in ascertaining the forgery and giving them notice of it.

But it is not necessary to examine this question, as the point already decided decides the case.

*The judgment of the Circuit Court is affirmed, with costs.*²

LENNIG v. RALSTON.

IN THE SUPREME COURT, PENNSYLVANIA, 1854.

[*Reported in 23 Pennsylvania Reports, 137.*]

ERROR to the District Court, Philadelphia.

This was an action in the name of Frederick Lennig v. A. G. Ralston and others trading as A. G. Ralston & Co. The action was

¹ 3 Hill (S. Ca.), 227.

² *Burgess v. Northern Bank*, 4 Bush, 600; *Coggill v. American Bank*, 1 Comst. 113; *Meacher v. Fort*, 3 Hill (S. Ca.), 227. *accord.*

See *Stone v. Freeland*, 1 H. Bl. 316, n. — *Ed.*

founded on a bill of exchange dated at Philadelphia, drawn by the defendants in blank, and, after being filled up in England, there negotiated. The bill, after being filled up, was as follows, the parts in italics being those inserted in the instrument after its transmission to England:—

“ PHILADELPHIA, July 3, 1850.

“ Exchange for £786 7s. 3d. Stg.

“ *Ninety days* after *sight* of this first
of Exchange (Second and Third of same tenor and date
unpaid) Pay to the order of *George Hennet, Esq.*,
Seven hundred eighty six Pounds, 7s. 3d. Stg.
Value received and charge the same to account.

“ To *Adams & Co.*

A. & G. RALSTON & Co.

“ *Indorsed George Hennet,*

“ London.

“ Accepted July 22, 1850, at Messrs. Glynn & Co., London.”

The defendants, the drawers of the bill, were citizens of the United States, composing a firm in Philadelphia, two of them being residents thereof, the third partner, Ralston, being a resident of London, where they had a firm of the same name.

The bill, after being signed in Philadelphia, was sent by the firm in Philadelphia to G. Ralston in London, who procured the same to be accepted by Adams & Co. in London, and then sold the same to George Hennet, and filled in the name of Hennet as payee, and otherwise completed the bill, so as to read as before stated.

At the time of the purchase as aforesaid, Hennet gave full value for the bill; and he afterwards had it discounted by the Commercial Bank of London, who gave full value for it, and had no knowledge of how the name of George Hennet had been inserted, nor how or where the bill had been negotiated or filled in with the name of George Hennet.

Upon maturity of the bill, it was protested for non-payment, and notice thereof given to defendants; and the bill was then returned by the Commercial Bank of London to the plaintiff, as their agent in Philadelphia, to sue upon.

The question was submitted to the court whether twenty per cent damages, allowed by the Act of 30th March, 1821, upon the principle of bills drawn upon persons in Europe, are recoverable in this suit. The court below was of opinion that they were not recoverable in this case, and judgment was entered accordingly. Such judgment was assigned for error.

The Act of 30th March, 1821, provides that wherever any bill of exchange, hereafter to be drawn or indorsed within this Commonwealth, upon any person or persons or body corporate of, or in any

other State, Territory, or place, shall be returned unpaid, with a legal protest, the person or persons to whom the same shall or may be payable shall be entitled to recover and receive from the drawers or indorsers the damages afterwards specified, over and above the principal sum and charge of protest, together with lawful interest on the principal sum, &c. In case a bill be drawn upon any person or body corporate in Europe, or any of the islands thereof, the damages were to be twenty per cent.

The Act of 13th May, 1850, reduced the damages to ten per cent on such bills drawn or indorsed after the first day of August, 1850, within this Commonwealth, upon persons in Great Britain or other places in Europe.

C. & J. Fallon, for plaintiff in error.

G. M. Wharton, for defendants in error.

The opinion of the court was delivered, May 16, by

LEWIS, J. This suit is brought for the benefit of the Commercial Bank of London, upon an instrument which bears upon its face every mark of a foreign bill of exchange, drawn in Philadelphia upon a house in London, and accepted by the latter. It is true that the bill was not actually negotiated in this State, so that it is not, within the letter of the statute of 1821, a bill "drawn in Pennsylvania." The drawers had a mercantile house in Philadelphia; and they placed "Philadelphia" at the head of the bill as the place at which it was to bear date, leaving blanks for the day of the month and the year. They fixed the amount of it and signed it, leaving blanks also for the period which the bill had to run before maturity and for the names of the payee and acceptors. All this was done by the defendants here. The instrument was then sent, in this imperfect condition, to their partner in London. This authorized him to fill the blanks and negotiate it in London; and he did so. It was purchased by the bank without any notice of the manner in which it originated or of the fact that it was issued in that city, and not in Philadelphia. When that institution became the holder, it bore the dress of a bill of exchange drawn in Pennsylvania; and, upon the principle that every one is presumed to intend to produce all the consequences to which his acts naturally and necessarily tend, the presumption is that the defendants intended that the purchasers of it should receive it under the belief that it was a bill drawn in Philadelphia, in the usual course of business. The question is, whether they shall be compelled to perform their contract in the sense in which they intended the opposite party to understand it, or in a sense contemplated only by themselves, and entirely excluded by the terms of the instrument itself. It is very material to the parties that this question should be properly decided.

The bill was drawn on the 3d of July, 1850. The Act of 13th May, 1850, reducing the damages on dishonored foreign bills of exchange to ten per cent, contains a provision limiting its operation to bills drawn after the 1st of August, 1850. So that, if the bill in question is to be enforced according to its terms, the Act of 30th March, 1821, giving twenty per cent damages for its dishonor, furnishes the rule of decision.

All writers of authority on questions of morals agree that promises are binding in the sense in which the promissors intended at the time that the promisees should receive them. Paley, c. 5; Wayland, c. 2; Adams, Pt. III. c. 5. Upon this principle, it was deemed a gross violation of contract, when Mahomet, after promising to "spare a man's head," ordered "his body to be cut through the middle." When Tamerlane, at the capitulation of Sabasta, promised to "spill no blood," it was an infraction of the treaty to "bury the inhabitants alive." These monstrous constructions of contracts were condemned by the civilized world as gross violations of the established rule of construction already indicated. Vattel, B. 2, c. 17, § 274. There can be no plainer principle of equity than that which requires every one to speak the truth, if he choose to speak at all, in matters which affect the interests of others. He that knowingly misrepresents a fact for the purpose of inducing another to part with his money or goods is held to his representation in favor of the party who confided in it. It is upon this principle that the maker of a negotiable instrument is not allowed to impair its value in the hands of a *bona fide* holder, by denying the existence of a consideration, or by otherwise showing that it is not what it purports to be. Chitty on Bills, 9; 7 C. & P. 633; Byles on Bills, 65. On the same principle, a man who procures credit for an insolvent person, by knowingly misrepresenting him to be a man of ability, is bound to answer in damages for the injury thereby produced. In truth, the law-merchant is a system founded on the rules of equity, and governed, in all its parts, by plain justice and good faith. *Master v. Miller*.

When this bill was dressed in the costume of a Pennsylvania bill, it thereby gained a credit in the foreign market which it could not otherwise have received. The Act of 1821, providing ample damages in the case of the dishonor of bills drawn in Pennsylvania, contributed to give it that credit. That Act must be considered as operating on the minds of those who purchased it. In *Ripka v. Gaddis*, Philadelphia, March, 1852, it was declared by this court, after a careful examination of the authorities, that "it had been long established, in the case of negotiable paper of every kind, that it is construed and governed, as to the obligation of the drawer or maker, by the law of the country

where it was drawn, or made : as to that of the acceptor, by the law of the country where he accepts ; and as to that of the indorser, by the law of the country where he indorsed." In *Hazlehurst v. Kean*,¹ it was affirmed that the parties in the purchase of a bill of exchange must be supposed to have in contemplation the law of the place where the contract was made, and it (that is, the law of the place where the bill was drawn) necessarily forms a part of the contract. In *Allen v. The Bank*,² the same principle was reasserted. From this rule, thus repeatedly recognized and well established, it follows that the bank in the purchase of this bill must be supposed to have had in contemplation the law of Pennsylvania providing indemnity for its dishonor. The law of this State was therefore a part of the contract of purchase, and we have no right to impair its obligation.

There is no reason why the statute of 1821 should not receive a liberal construction. It has been held that it is not a penal, but on the contrary that it is a remedial Act ; that the damages given are not for punishment, but are intended as compensation ; that its provisions are just and equitable, and highly necessary in a commercial community to guard the interests of innocent individuals, and to secure good faith in commercial transactions. 5 Whar. 425. No one can foresee the extent of the injury which the holder of a foreign bill of exchange may suffer from its dishonor. It is not like a domestic obligation, the breach of which can, in general, be repaired by the presence and credit of the holder. But the dishonor of foreign bills may occur, and usually does occur, at points where the holders cannot supervise the result, and where they have neither means nor credit to provide against the injury. These instruments are generally procured at a premium by the holders, for the purpose of making their purchases in the country where the bills are payable, or as the means of pursuing their travels, or maintaining their credit abroad. The great distance between the residence of the drawers and that of the acceptors must necessarily cause great delay in procuring indemnity from the former. In the mean time, the loss to the holders, if they rely exclusively upon the bills to maintain their credit and carry on their business, might be irreparable. Under such circumstances, the recovery of the face of the bill only, with the usual interest, re-exchange, and costs, would be but a cold and inadequate remedy for so great an injury. The Act of 1821 was deemed necessary, in order to do justice in such cases, and for the purpose of maintaining our commercial credit in other countries. It should receive such a construction as will best promote the intentions of the legislature in these respects.

¹ 4 Dall. 20.

² 5 Whar. 425.

Upon the whole, we are of opinion that the bill should be met by the drawers in the sense in which they manifestly intended that it should be received by the holder, and we think that the District Court was in error in adopting a different rule.

Judgment reversed, and judgment for the plaintiff in error for \$1,453.31, with interest from the 18th May, 1852, and costs of suit.

MOORE v. BAIRD.

IN THE SUPREME COURT, PENNSYLVANIA, 1858.

[*Reported in 30 Pennsylvania Reports, 138.*]

ERROR to the District Court of Philadelphia.

This was an action of assumpsit, by Henry C. Baird against John W. Moore, to recover the amount of the defendant's promissory note for \$371.46, dated the 28th March, 1857, and payable four months after date to the order of William White Smith, who indorsed it to the plaintiff.

The plaintiff filed a copy of the note; and the defendant put in the following affidavit of defence:—

“John W. Moore, the defendant above named, being duly affirmed, says that he has a good defence to part of the claim of the plaintiff in this suit of the character following: That the promissory note on which this suit has been brought was made by him without any consideration, for the accommodation solely of one William White Smith, who passed the same to the plaintiff. This deponent has been informed, and believes, and expects to be able to prove, that the said plaintiff gave to said Smith for said note but the sum of \$348; and this deponent is advised that the said plaintiff is not entitled to recover but the sum actually advanced by him on said note, with legal interest, and further says not.”

The court below gave judgment for the full amount of the note, notwithstanding the affidavit of defence, which was here assigned for error.

Thorn, for the plaintiff in error, cited *Story on Promissory Notes*, § 190; *Nash v. Brown*, *Simpson v. Clark*,¹ *Collins v. Martin*, *Heath v. Sansom*,² *Thomas v. Newton*,³ *Jones v. Hibbert*.

Eldridge, for the defendant in error. *Gaul v. Willis*,⁴ *Lord v. Ocean Bank*.

¹ 2 C. M. & Ros. 342.

³ 2 Car. & P. 606.

² B. & Ad. 291.

⁴ 2 Casey, 259.

The opinion of the court was delivered by

STRONG, J. He, who lends his own promissory note for the accommodation of another, lends his credit without any restriction as to the manner of its use. As between the maker and the payee, there is an available defence, but the maker cannot complain of a subsequent holder when called upon to perform all he has promised. An indorsee, though he received it as collateral security, and is not therefore a holder for value, may recover the full amount of the note, *Lord v. Ocean Bank*; and a holder for value may recover, though he knew, at the time he purchased, that it was an accommodation note, and that there was no consideration between the maker and the payee. *Charles v. Marsden*, *Fulweiler v. Hughes*.¹ Were it not so, the purpose intended by the original parties to the paper would be defeated. In *Gaul v. Willis*,² a suit, indeed, by the second indorsee against the maker, the holder was allowed to recover against the maker of an accommodation note the entire amount according to its tenor, though the discount at each negotiation had exceeded six per cent. He was regarded as not the less a *bona fide* holder for value, because he purchased for less than upon the face of the note appeared to be due. What has the maker to do with that? He has lent his credit for the sum named in the note. Shall one who has received it as collateral, and is not therefore a holder for value at all, be permitted to recover, and a recovery be denied to him who is a holder for value, but happens to have purchased for less than the face of the paper? Such is not the law.

In the present case, the plaintiff below was not only a holder for value, but he purchased without knowledge that it was an accommodation note. The defendant had therefore, according to his own showing, no defence, and the judgment of the court below is right.

*Judgment affirmed.*³

¹ 5 Harris, 440.

² 2 Casey, 259.

³ *Sherman v. Blackman*, 24 Ill. 347; *Dickerman v. Day*, 31 Iowa, 444; *Shackelford v. Morriss*, 1 J. J. Marsh. 497; *Richardson v. Scobee*, 10 B. Mon. 12 (*semble*); *Veazie Bank v. Paulk*, 40 Me. 109 (*semble*); *Tufts v. Shepherd*, 49 Me. 312 (*semble*); *Gaul v. Willis*, 26 Pa. 259; *Ramsey v. Clark*, 4 Humph. 244; *Taylor v. Bruce*, Gilmer, 42; *Whitworth v. Adams*, 5 Rand. 333; *Hansbrough v. Baylor*, 2 Munf. 36; *Brummel v. Enders*, 18 Gratt. 873; *Gimmi v. Cullen*, 20 Gratt. 439; *Otto v. Durege*, 14 Wis. 571, *accord*.

Conf. Cameron v. Nall, 3 Ala. 158; *Holeman v. Hobson*, 8 Humph. 127. — ED.

GEORGE FEARING v. LEONARD CLARK.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER
TERM, 1860.

[*Reported in 16 Gray, 74.*]

ACTION of contract on a promissory note for \$600, made by the defendant, dated July 4, 1857, and payable in one year after date to the order of one Joseph Lambrite, and by him indorsed. The defendant in his answer denied the making and indorsement of the note declared on, but admitted that he signed such a note, and averred that he put it into the hands of third parties to be delivered to Lambrite, on the happening of contingencies which never did happen; and that neither the defendant nor those parties, nor any one else, by his authority or consent, ever delivered the writing to Lambrite, or to any other person as the defendant's promissory note.

At the trial in the Superior Court, the plaintiff proved the signatures of the maker and indorser; and there was evidence that, on the 16th of July, 1857, the note was in Lambert's possession, and was indorsed and delivered by him to the plaintiff as collateral security for the payment in six months of \$2,000, of which \$900 was still due from Lambrite to the plaintiff at the time of the trial, and that the plaintiff took the note without any knowledge of the circumstances under which it had been given.

Rockwell, J., allowed the defendant to introduce evidence of the facts alleged in his answer, against the objection of the plaintiff that they would constitute no defence to the action, unless proved to have been known to the plaintiff when he took the note; and instructed the jury "that, if they should find that the writing copied in the declaration was never delivered by the defendant, or any person authorized by him so to deliver it, to the payee, or to any person for his use, but that he obtained possession of it without the assent or knowledge of, or authority from, the defendant, and, having obtained such possession without right or authority, put his name upon the back of it, and delivered it to the plaintiff, then and in that case it never became the negotiable note of the defendant, and the defendant was entitled to their verdict." The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

J. M. Stebbins, for the plaintiff.

F. Chamberlin, for the defendant, cited *Churchill v. Gardner*,¹

Marston v. Allen, Agawam Bank v. Strever,¹ Wheelwright v. Wheelwright,² Bodwell v. Webster;³ Story on Bills, § 203.

BIGELOW, C. J. The defendant proved no facts at the trial which constituted a valid defence to the note declared on as against the plaintiff, who is a *bona fide* holder for value without notice. The rule is well settled that, when a note is transferred by a party to whom it is intrusted without authority, or fraudulently, it will be valid as against the maker in the hands of a holder who takes it *bona fide* without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case, the maker or indorser who places it in the hands of another, for the purpose of being used in a particular way or for a special object, takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come. Chit. Bills (10th ed.), 198. Sweetser v. French.⁴ It is undoubtedly true that, as between the original parties to a note, or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case, a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of Putnam v. Sullivan⁵ is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only; and it was held that a delivery by the clerk, whether through deception practised on him, or by a voluntary violation of the trust reposed in him, must be deemed in law, as against a *bona fide* holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences, which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception, or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled

¹ 18 N. Y. 507.

² 2 Mass. 452.

³ 13 Pick. 414.

⁴ 2 Cush. 309.

⁵ 4 Mass. 45.

them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value, without notice.

*Exceptions sustained.*¹

CHARLES F. WHITTEN v. CALEB HAYDEN AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1863.

[Reported in 7 Allen, 407.]

CONTRACT upon a promissory note for \$250, signed by the defendant Hayden, payable in one month from date to the order of Moses G. Cobb, and by him indorsed to the plaintiff.

At the trial in the Superior Court, before Russell, J., without a jury, it appeared that the note was signed by Hayden without consideration, to enable Cobb to obtain the money upon it; and that Cobb disposed of it to a broker for less than its face. The defendant asked the court to hold that the transaction was usurious; but the judge declined so to do, and found as a fact that a sale of the note was proved, and not a usurious contract, and rendered judgment for the plaintiff. The defendants alleged exceptions.

I. Knowles, Jr., for the defendants.

J. M. Way, for the plaintiff.

BIGELOW, C. J. The ruling of the court was erroneous. The note did not become an operative contract, binding on the defendants, until it was negotiated by the payee to the broker, who advanced upon it a sum less than the amount due thereon, after deducting lawful interest. Previous to such negotiation, no action could have been maintained upon the note by any one. Such advance of money was in legal effect a loan, and not a sale of a negotiable note in the hands of an indorsee. If a greater rate of interest than six per cent was reserved upon it, when it was thus negotiated, the contract was usurious, and the defendants were entitled to a deduction of threefold the amount of the interest so unlawfully reserved, under Gen. Sts. c. 53, § 4, even in the

¹ Vallette v. Parker, 6 Wend. 615, *accord.* — ED.

Chipman v. Tucker, 38 Wis. 43; Roberts v. Wood, 38 Wis. 60; Roberts v. McGrath, 38 Wis. 52, *contra*.

If a surety sign a note and deliver it to his principal with the understanding that it is not to be negotiated until another name is added or some other condition performed, and the principal wrongfully negotiates it to a holder for value without notice, the surety is liable. Young v. Ward, 21 Ill. 223; Stricklin v. Cunningham, 58 Ill. 293 (*semble*); Deardorff v. Foresman, 24 Ind. 481; Gage v. Sharp, 24 Iowa, 15; Laub v. Rudd, 37 Iowa, 617; Smith v. Moberly, 10 B. Mon. 266; Jones v. Shelbyville Co., 1 Met. Ky. 58; Coffman v. Wilson, 2 Met. Ky. 542 (*semble*); Wagner v. Diedrich, 50 Mo. 484 (*semble*); Merritt v. Duncan, 7 Heisk. 156; Merriam v. Rockwood, 47 N. H. 81; Mickles v. Colvin, 4 Barb. 304; Passumpsic Bank v. Goss, 31 Vt. 315; Dixon v. Dixon, 31 Vt. 450; Farmers' Bank v. Humphrey, 36 Vt. 554, *accord.* — ED.

hands of a *bona fide* indorsee. *Sylvester v. Swan*,¹ *Kendall v. Robertson*.² The provision in St. 1863, c. 242, that usury between the payee and maker of a promissory note payable on time shall be no defence as against a *bona fide* indorsee of the note, taking it before its maturity, does not apply to transactions which took place before that statute was passed. *North Bridgewater Bank v. Copeland*.³

Exceptions sustained.⁴

THE MECHANICS' BANK OF THE CITY OF NEW YORK,
RESPONDENT, v. JOHN STRAITON, CHARLES G. SAN-
FORD, AND THOMAS J. RAYNOR, APPELLANTS.

IN THE COURT OF APPEALS, NEW YORK, JANUARY, 1867.

[Reported in 3 Keyes, 365.⁵]

APPEAL from a judgment of the Supreme Court, rendered at general term, in the second district, affirming a judgment at special term overruling a demurrer.

The action was brought by the respondents as the holders of a check payable to "bills payable or order" against the appellants as drawers.

The complaint alleges that the appellants drew the check, and that it was afterward for a valuable consideration transferred and delivered to the respondents, whereby they became and are the holders and owners of it.

The appellants demurred on the grounds: first, that the check is an irregular instrument, not negotiable and void; second, that the complaint does not state facts sufficient to constitute a cause of action.

¹ 5 Allen, 134.

² 12 Cush. 156.

³ 7 Allen, 139.

⁴ *Faris v. King*, 1 Stew. 255; *Metcalf v. Watkins*, 1 Port. 57; *Saltmarsh v. P. & M. Bank*, 14 Ala. 668; *Carlisle v. Hill*, 16 Ala. 398; *Cockey v. Forrest*, 3 Gill & J. 432; *Sauerwein v. Brunner*, 1 Har. & G. 477; *Sylvester v. Swan*, 5 All. 134; *N. Bridgewater Bank v. Copeland*, 7 All. 139; *Bennet v. Smith*, 15 Johns. 355; *Powell v. Waters*, 17 Johns. 176; 8 Cow. 669, s. c.; *Aeby v. Rapelye*, 1 Hill, 9; *Holmes v. Williams*, 10 Paige, 326; *Dowe v. Shutt*, 2 Den. 621; *Williams v. Storm*, 2 Duer, 52; *Catlin v. Gunter*, 11 N. Y. 368; *Clark v. Sisson*, 4 Duer, 408; 22 N. Y. 312, s. c.; *Clark v. Loomis*, 5 Duer, 468; *Bossange v. Ross*, 29 Barb. 576; *Jackson v. Fassitt*, 33 Barb. 645; *Hall v. Earnest*, 36 Barb. 585; *Simpson v. Fullenwider*, 12 Ired. 334; *Flemming v. Mulligan*, 2 McC. 173, *accord*.

See also *Ayer v. Tilden*, 15 Gray, 178; *Bock v. Lauman*, 24 Pa. 435. — ED.

⁵ 5 Abb. Fr. n. s. 11, s. c. — ED.

SCRUGHAM, J. The rules which establish the negotiability of commercial paper apply to bank checks as to other bills of exchange, and the doctrine, that, when such instruments are made payable to the order of a fictitious payee, they are to be construed and treated as payable to bearer, is too well settled to admit of serious question.

In the great case of *Minet v. Gibson*, the determination proceeded upon the ground that according to the true intent and meaning of the parties the bill was intended to be made payable to bearer.

The words "or order," "or bearer," and "bearer," in notes or bills, are words of negotiability, without which or other equivalent words the instrument will not possess that quality, and therefore the use of either of these expressions by the drawer of a bill or maker of a note must be regarded as indicating his intention that the paper shall be negotiable.

By naming the person to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designation, are capable of no reasonable interpretation except as expressive of an intention that the bill shall be negotiable without indorsement, *i. e.* in the same manner as if it had been made payable to bearer.

It was not, before the Code, necessary for the holder of an instrument payable to bearer to allege or prove in an action against the maker the transfers through which he derived his title (2 Greenl. on Ev. § 161, and cases there cited; 3 Philips on Ev. [4th Am. ed.] 191), and it certainly is not now.

The engagement is to pay to the bearer, and that the plaintiff is such is one of the material elements of his cause of action. That fact must therefore be stated in his complaint, and its statement will be a sufficient allegation of his title; for it is the fact, and not evidence of the fact, which is required to be pleaded.

It is not only stated in the complaint in this action, that the plaintiff is the holder and owner of the check, but also that it was transferred and delivered to him for a valuable consideration, and that he became its owner and holder by virtue of that transfer and delivery. This cannot be true, unless the drawer of the check transferred and delivered it directly to the plaintiff, or to some other person by or through whom it was transferred to the plaintiff. And this averment, if an allegation of a transfer and delivery by the drawer is necessary, is sufficient on demurrer within the cases of *The People ex rel. Crane*

v. Ryder,¹ and Prindle v. Caruthers.² The judgment should be affirmed.

All the judges concurring,

*Judgment affirmed.*³

ORRIN A. WAIT v. NORMAN G. POMEROY.

IN THE SUPREME COURT, MICHIGAN, MAY 11, 13, 1870.

[Reported in 20 Michigan Reports, 425.]

ERROR to Washtenaw Circuit.

This was an action of trover brought by Pomeroy in the Circuit Court for the County Washtenaw, for the value of a pair of horses delivered by him to Wait, in exchange for a promissory note, of which the following is a copy:—

“\$200.00.

TOWNSHIP OF SHARON, Oct. 12, 1868.

“One year after date, I promise to pay W. D. Munn, or bearer, two hundred dollars, for value received, with ten per cent interest.

“No. 11

CONRAD HISELSCHWERDT.”

The plaintiff offered evidence to show that, at the time of the trade, the defendant stated to the said plaintiff that the maker of the note “lived or had lived on the Rowe farm, and that said note was good and the Dutchman all right;” and that, if at any time he was dissatisfied with said note, he might return the same, and defendant would trade back; and that the trade was made on those terms. The maker of the note was produced and sworn as a witness on the part of the plaintiff, and admitted that he signed the note, but that, when the note was given, there was a clause below stating that if a machine was not delivered the note was not to be paid. The words were, “If the machine should not be delivered, this note not to be paid.” The witness stated further: “The machine was never delivered. I would not sign the note without those words. I never lived on the Rowe farm. I was not good last April,—I had no property then liable to execution.”

The court charged the jury as follows: If you should find that the defendant represented the note as all right, and if you should find that the note was originally given with a memorandum or writing at

¹ 2 Kern. 433.

² 15 N. Y. 425.

³ Willets v. Phoenix Bank, 2 Duer, 121; Davega v. Moore, 3 McC. 482, accord.—
ED.

the bottom of the note, limiting or fixing the payment of the note upon condition that the machine or implement for which the note was given should be delivered before the note should become payable, and if this memorandum has been removed, and if the machine has not been delivered, then the note, even in the hands of a *bona fide* purchaser, would not be collectible as against the maker. And, further, the cutting off a memorandum or writing at the bottom of a note, which, in some material point, affects the terms of the note, would render the note invalid in the hands of an innocent or *bona fide* holder of the note. To which the defendant excepted. The jury found for the plaintiff, and the judgment entered on the verdict, the defendant below brings into this court by writ of error.

Joslin and Blodget, for plaintiff in error.

H. J. Beakes and *R. E. Frazer*, for defendant in error.

CAMPBELL, C. J. The only question raised in this case is whether the destruction of a memorandum, written under a promissory note, and qualifying it, vitiates the note in the hands of a *bona fide* holder having no knowledge of the alteration.

We think it quite clear upon the authorities that the note and memorandum constituted but one contract, and were in law a single instrument. There are some decisions which have held particular memoranda immaterial. But no case has been cited, and we have found none which holds that, if material, it may be disregarded. The cases are fully collected in 2 Pars. Bills and Notes, 539 and *seq.* And while a memorandum on a separate paper is said by Mr. Parsons not to affect parties taking without notice, it is otherwise where all is in one instrument. To use the language of the Court of Queen's Bench, in *Warrington v. Early*:¹ "This forms part of the contract. It would clearly have been so, if it had been written in the body of the note; and we think a memorandum of this kind written in the corner of the note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded. Accordingly, a memorandum fixing the rate of interest was held a material alteration of the note, which destroyed its validity.

If it formed a part of the original contract, it was a material alteration to detach the memorandum, and leave the note as if it had been absolute. And it is a principle well settled that such an alteration avoids the entire obligation. In *Wheelock v. Freeman*,² the precise point was decided on such a memorandum separated from a note; and a similar question had arisen in *Coolidge v. Inglee*,³ and a similar

¹ 2 Ellis & Bl. 763.

² 13 Pick. 165.

³ 18 Mass. 26.

ruling was made there. The same decision was made in *Johnson v. Heagan*.¹ In *Burchfield v. Moore*,² the addition of a place of payment was regarded as a material alteration, so as to avoid a bill, although by act of Parliament the acceptance was made a general one when such words were used originally; for the court held that the acceptor might be prejudiced by the change. And, although the bill was in the hands of a *bona fide* holder, it was decided that he could not sue upon the bill, but must look to the party from whom he took it for a return of the consideration. It was held that a similar remedy might be resorted to by the successive holders until they reached the party through whose fraud or laches the alteration was made. And the court remarked, "The negotiability of bills of exchange is to be favored; but with this view it is material that their purity should be preserved." And, if the alteration is material, it makes no difference whether apparently favorable or prejudicial. *Gardner v. Walsh*.³ That may, in some cases, have a material bearing, where the fact of consent is in issue.

There seems at first a plausibility in the argument that a party, by signing a note with a separate memorandum beneath, puts it in the power of the holder to gain easier credit for the note than it would be likely to gain if altered in the body. But, as it was well suggested on the argument, no one is bound to guard against every possibility of felony. And, practically, it is a matter of every-day occurrence to feloniously alter negotiable paper as successfully by changes on the face as in any other way. The public are not very much more likely to be defrauded in one way than in another. There can never be absolute safety except by looking to the character and responsibility of the persons from whom such paper is received, and who are always bound to respond for the consideration, if it is forged. *Little v. Derby*.⁴ If a party makes a contract in such a manner as is authorized by law, he has a right to object to being bound to any other. A *bona fide* holder before maturity is allowed to receive the genuine contract, discharged from any equities attaching to the contract itself, as between the original parties, but he cannot get a contract where none was made.

The judgment was correct, and should be affirmed.

The other justices concurred.⁵

¹ 23 Maine, 329.

² 3 E. & B. 383.

³ 5 E. & B. 83.

⁴ 7 Mich. 325.

⁵ *Cochran v. Nebeker*, 48 Ind. 459; *Gerrish v. Glines*, 56 N. H. 9; *Benedict v. Cowden*, 49 N. Y. 396, *accord*.

Elliott v. Levings, 54 Ill. 213; *Phelan v. Moss*, 67 Pa. 59; *Zimmerman v. Rote*, 75 Pa. 188, *contra*.

See *Redlich v. Doll*, 54 N. Y. 234, 240. — Ed.

THOMAS D. CLARKE v. JOHN JOHNSON.

IN THE SUPREME COURT, ILLINOIS, JUNE TERM, 1870.

[Reported in 54 Illinois Reports, 296.]

APPEAL from the Circuit Court of Clay County, the Hon. Richard S. Canby, judge, presiding.

The opinion states the case.

Mr. George W. Henry, for the appellant.

Messrs. Bryan, Rotan, and Brewer, for the appellee.

MR. JUSTICE WALKER delivered the opinion of the court.

This was an action of assumpsit on a promissory note executed by defendant to one Bush, on the 28th of October, 1869, for \$108, due at one day, with ten per cent per annum interest. On the back of the note was indorsed an assignment, in the usual form, but without date, to plaintiff. A plea, among others, was filed, averring that the making of the note was obtained by fraud and circumvention. A trial was had, resulting in a verdict and judgment in favor of defendant; and plaintiff has brought the record to this court, and assigns various errors.

On the trial, appellee testified that he signed the note as it appeared at the trial; that it had not been altered after it was signed. He states that Bush came to his house at the date of the note, and proposed to sell him a ploughing-machine, and that, being in doubt as to the truth of Bush's representations, and Bush having proposed to go to the railroad station and telegraph to the manufacturers for the purpose of satisfying appellee, he was about to insert a condition in the note that would insure the delivery of the ploughs, or render it void, when Bush snatched the note from appellee, and ran off with it; that he had never seen Bush afterwards, and was, at the time, too unwell to prosecute him; that he intended to insert a condition in the note before giving it to Bush; knew nothing of Clarke until the note was assigned to him. He states he never received the ploughs or machinery, and, on writing to the manufacturers, they denied knowing Bush, and disclaimed his agency.

The court thereupon gave this instruction:—

“The plaintiff is entitled to recover on the note in question, if the jury are satisfied that the defendant executed the note in question. It is no defence to an action on such note, that the note was obtained in bad faith, or that it was surreptitiously obtained by the payee, or even forcibly, if it was assigned before due. The defend-

ant denies, by his pleas, the making and delivery of the note, as his note; for a note cannot be said to be executed until it is delivered: the making is not complete without a delivery. If the jury shall believe, from the evidence, that defendant never executed this note,—that is, that there was no legal and valid execution of the note on his part, by a delivery of it, as well as signing,—it was not his note, and the defendant will be entitled to a verdict.”

This instruction manifestly misled the jury in arriving at their verdict. It asserts that the note was not executed until it was delivered, and that, if appellee did not deliver it, there was no legal and valid execution of the note that would bind appellee for its payment, and he was entitled to a verdict. This is, no doubt, true as between the parties, but not as to an innocent purchaser before maturity. And when an assignment is found on a note, without date, the presumption is that it was indorsed at the date of its execution.

In the case of *Shipley v. Carroll*,¹ the plea averred that the note was written and signed by the maker, simply and solely as a matter of amusement, without any design of delivering it to the payee, and that the payee feloniously stole the note from the maker, and that he never was the legal holder or owner of the note. In that case, the note had been assigned before maturity, and on demurrer it was held that the plea did not, as against the assignee before it fell due, present a defence to its collection. That case was certainly as strong as this, and, being similar in principle, it must control, and is decisive of, the case at bar.

The judgment of the court below must be reversed, and the cause remanded.

*Judgment reversed.*²

CAULKINS v. WHISLER.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1870.

[Reported in 29 Iowa Reports, 495.]

ACTION upon a promissory note; defence that the instrument is a forgery. The cause was submitted to the court without a jury. The

¹ 45 Ill. 285.

² *Shipley v. Carroll*, 45 Ill. 285; *Worcester Bank v. Dorchester Bank*, 10 Cush. 488; *Kinyon v. Wohlford*, 17 Minn. 239; *Briggs v. Ewart*, 51 Mo. 245, 249 (*semble*); *Gould v. Segee*, 5 Duer, 260, *accord*.

Cline v. Guthrie, 42 Ind. 227 (*semble*); *Burson v. Huntington*, 21 Mich. 415; *Hall v. Wilson*, 16 Barb. 548, 555 (*semble*), *contra*.

Conf. Ledwich v. McKim, 53 N. Y. 307. — ED.

court found the following facts: Defendant entered into a contract with one Smith to sell for him, as his agent, grain-seeders. At Smith's request, defendant signed his name upon a blank piece of paper, which Smith was to send to the manufacturers of the seeders, that they might know defendant's signature upon orders which he should make upon them for the machines. The signature was made for no other purpose. The instrument in suit was printed over the signature of defendant, so obtained without his knowledge and consent, and the stamp in the same manner attached and cancelled. The plaintiff purchased the note before maturity, for a valid consideration, and without knowledge of any matter connected with its execution. Upon these findings, the court held that the note is a forgery and void, and that plaintiff is not entitled to recover thereon. Plaintiff appeals.

McCoid and *Herron*, for the appellant.

D. P. Stubbs, for the appellee.

BECK, J. A holder of negotiable paper, acquired before dishonor, is not protected against defences that make void the instrument. He can have no claim upon forged paper against the person whose name is falsely affixed thereto as the maker, and who is without fault as to the forgery and the taking of the paper by the holder. 1 Parsons, Bills and Notes, 75, and authorities cited.

Is the note sued upon a forged instrument? "The making or alteration of any writing with fraudulent intent, whereby another may be prejudiced, is forgery." *State v. Wooderd*.¹ In order to constitute the offence of forgery, it is not necessary that the signature of the instrument be false. The instrument may be altered, so that it is not the instrument signed by the maker; and, if this be fraudulently and falsely done, it is forgery. So, if words be added to change its effect, with like intent, it is a forgery. In the case before us, the instrument was falsely and fraudulently made over the genuine signature of defendant, which was not obtained for the purpose of binding defendant by any contract. It is evident that this differs in no respect from the cases mentioned, and that the note is a forgery and void. See 2 Parsons, Bills and Notes, 584.

The case differs materially in its facts from the cases cited in support of plaintiff's right to recover. In those cases, blanks were filled up contrary to the direction of the maker, or without his authority. But in all of such cases the makers intended to execute an instrument that should be binding upon them. Blanks were filled up contrary to the authority given by the makers, or in some other way the instruments were made so that they did not correspond with the intention

¹ 20 Iowa, 542; Rev. § 4253.

of the makers; but, in all such cases, there were makers and instruments, and through the frauds of those to whom the instruments were intrusted they were thus made to be of different effect than was designed by the makers. In these cases, it is correctly held that, while the parties perpetrating the fraud in some cases may have been guilty of forgery, yet the makers were bound upon the instruments, as against holders in good faith and for value. The reason is obvious. The maker ought rather to suffer, on account of the fraudulent act of one to whom he intrusts his paper, or who is made his agent in respect of it, than an innocent party. The law esteems him in fault, in thus putting it in the power of another to perpetrate the fraud, and requires him to bear the loss consequent upon his negligence. In the case under consideration, no fault can be imputed to the defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it; for it is not unusual, in order to identify signatures, and for other purposes, for men thus to make their autographs. The defendant cannot be regarded as being so far in fault in the transaction that he ought to be required to bear the loss resulting from the crime.

In our opinion, the decision of the Circuit Court is in accord with the law, and is therefore

*Affirmed.*¹

JAMES W. HARVEY v. GEORGE F. SMITH.

IN THE SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1870.

[*Reported in 55 Illinois Reports, 224.*]

APPEAL from the Circuit Court of Kane County; the Hon. Silvanus Wilcox, judge, presiding.

This was an action on a promissory note by an assignee against the maker, given for the purchase of some fanning mills. The defendant testified on the trial that the mills had never been delivered to him, and that the note, at the time he executed it, contained a condition, written in pencil, as follows: "This note is not to be paid until fourteen mills are sold," and that the same had since been erased. The note, as offered in evidence, was written in ink, and bore no trace of a pencil mark, or any indication of alteration.

Messrs. Barry & McClellan, for the appellant.

Mr. W. B. Plato, for the appellee.

MR. JUSTICE BREESE delivered the opinion of the court.

¹ *Nance v. Lary*, 5 Ala. 370, *accord*. — ED.

This was an action of assumpsit, in the Kane Circuit Court. The defence was that the note had been altered in a material part since its execution and delivery. The jury found for the defendant. A motion for a new trial was duly made and overruled, and judgment rendered on the verdict.

To reverse this judgment, the plaintiff appeals to this court.

The note sued on had been assigned to the plaintiff some months before its maturity, and under circumstances to excite no suspicion or inquiry. Full value was paid for the note; and the evidence to establish the defence was so slight, compared with that produced by the plaintiff, that the note had not been altered in any respect, the jury should not have hesitated to find a verdict in favor of the plaintiff.

The following instruction was asked by the plaintiff, which the court refused:—

“Although the jury may believe, from the evidence, that the note, at the time it was executed by the defendant, had the words ‘after the sale of fourteen mills,’ and although the jury may believe from the evidence that said words have been erased, yet, if the jury further believe from the evidence that those words were put upon the paper with such light material that they could be erased without leaving any trace upon the paper which could be detected by a prudent and careful man, and if they further believe from the evidence that said words were erased from the paper without leaving any traces behind them to show that they had ever been upon the paper, and that said erasure was made without the knowledge of the plaintiff and before he purchased the same, then the law is for the plaintiff, and the jury should so find.”

It appears from the evidence that the words in question were written on this note in pencil, and in view of this fact the instruction should have been given.

If a person signs a note written partly in ink, but containing a material condition, qualifying his liability, written only in pencil, he is guilty of gross carelessness; and if the writing in pencil is erased so as to leave no trace behind, or any indication of alteration, as it easily may be, we are of opinion an innocent holder, taking the note before maturity, for a valuable consideration, will take it discharged of any defence arising from the erased portion of the note, or from the fact of alteration. *Young v. Grote.*

Had this instruction been given, it is not probable a verdict would have been found for the defendant. This instruction should not have been refused. For this error, and for refusing the motion for a new trial on the evidence, the judgment must be reversed and the cause remanded.

Judgment reversed.

WILLIAM McGRATH, RESPONDENT, v. JOHN F. CLARK,
APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, JANUARY 29, 1874.

[Reported in 56 New York Reports, 34.]

APPEAL from judgment of the general term of the Supreme Court in the Third Judicial Department, affirming a judgment of the County Court of Washington County, in favor of plaintiff, entered upon a verdict.

This action was upon a promissory note against defendant, as indorser. The note, when indorsed by defendant, was as follows:—

“\$175. WHITEHALL, N. Y., Nov. 27, 1868.

“—— after date, I promise to pay Wm. McGrath, or bearer, \$175
at E. D. LANDON.”

After the indorsement, the note was delivered to the maker, who, before the delivery thereof to the payee (plaintiff), filled the blanks by inserting “six months” as the time, and “The National Bank of Poultney” as the place of payment, adding also the words “with interest.” The court directed a verdict for plaintiff, which was rendered accordingly.

A. H. Tanner, for the appellant. A material alteration of a bill or note, without authority or consent, will discharge a prior indorser. *Edwards on Bills*, § 95, and cases cited. The unauthorized addition of the words “with interest” is such a material alteration. *Woodworth v. Bank of America*,¹ *Clute v. Small*,² *Dewey v. Reed*,³ *Miles v. Starr*,⁴ *Waterman v. Vose*,⁵ *Warrington v. Early*,⁶ *Holmes v. Trumper*,⁷ *Fulmer v. Seitz*,⁸ *Hoffmer v. Wenrich*,⁹ *Kountz v. Kennedy*,¹⁰ *Garrard v. Huddan*,¹¹ *Britton v. Dierker*.¹² This is so, although the alteration was made without fraudulent intent. *Fay v. Smith*.¹³ The indorsement in blank gave no authority to add the words “with interest.” *Edwards on Bills*, 92; *Bank of America v. Woodworth*,¹ *Boyd v. Brotherson*,¹⁴ *Bruce v. Wescott*,¹⁵ *Clute v. Small*,² *Nazro v. Fuller*,¹⁶ *Kit-*

¹ 19 J. R. 391.

² 17 Wend. 238.

³ 40 Barb. 21.

⁴ 2 Bailey, 359.

⁵ 43 Me. 504.

⁶ 22 E. & B. 763.

⁷ 22 Mich. 427.

⁸ 68 Pa. 237.

⁹ 32 Pa. 423.

¹⁰ 63 Pa. 187.

¹¹ 67 Pa. 82.

¹² 46 Mo. 591.

¹³ 1 All. 477.

¹⁴ 10 Wend. 93.

¹⁵ 3 Barb. 374.

¹⁶ 24 Wend. 374.

chen v. Place.¹ Plaintiff is not a *bona fide* holder. Conley v. Grant,² Mech. Bank v. Douglass.³ The question, whether there was an authority to add the words "with interest," should have been submitted to the jury. Chitty on Cont., 786, and cases cited; Edwards on Bills, 95; Bruce v. Wescott,⁴ Herrick v. Malin,⁵ Boyd v. Brotherson,⁶ Bank of America v. Woodworth,⁷ Bishop v. Chambre,⁸ Taylor v. Mosley.⁹

L. H. Jessup, for the respondent. Plaintiff was a *bona fide* holder of the note. Van Duzer v. Howe.¹⁰ The holder of the note was authorized by implied authority to fill up the blank. Kitchen v. Place,¹ Mitchell v. Culver,¹¹ Mech. and F. Bank v. Schuyler.¹² A principal who places his agent in a position to commit a fraud should suffer, rather than a *bona fide* holder. McWilliams v. Mason,¹³ Chemung Co. Bank v. Bradner,¹⁴ Day v. Saunders,¹⁵ Griggs v. Howe.¹⁶ Defendant is estopped from denying liability or alleging against a *bona fide* holder that the alteration is a forgery. Kitchen v. Place,¹ Van Duzer v. Howe.¹⁰

CHURCH, C. J. The ruling of the learned judge at the circuit in directing a verdict for the plaintiff cannot be sustained. When the note was indorsed by the defendant, and delivered to the maker, the only blanks in it were the time and place of payment. These blanks the maker had an implied authority to fill up by inserting any time and place he chose; but he had no authority to make any material alteration in the note. The note was perfect in other respects. The addition of the words "with interest" increased the liability of the indorser; and the maker had no more right to add those words than he had to increase the sum for which the note was given by adding the amount of the interest to it for the time the note had to run. The defendant might have been willing to confer unlimited authority as to the time of payment. The longer the time, the less would be the present liability; and in no event could the liability exceed the sum specified. He never could be made liable for more than \$175; while an authority to add interest might render him liable for double that amount. The General Term affirmed the judgment upon the authority of Van Duzer v. Howe.¹⁰ In that case, an acceptance was delivered to the drawer of a bill, with the amount left blank, which the drawer filled up with a larger amount than was agreed upon between him and the acceptor; and the court very properly held that a *bona fide* holder

¹ 41 Barb. 466.⁴ 3 Barb. 379.⁷ 19 J. R. 391.¹⁰ 21 N. Y. 531.¹³ 31 N. Y. 294.¹⁶ 31 Barb. 100.² 36 N. H. 273.⁵ 22 Wend. 394.⁸ 3 C. & P. 55.¹¹ 7 Cow. 336.¹⁴ 44 N. Y. 686.³ 31 Conn. 170.⁶ 10 Wend. 93.⁹ 6 C. & P. 273.¹² 7 Cow. 336 a.¹⁵ 3 Keyes, 347.

could recover the amount. The indorsement and delivery to the maker of a blank note carries with it an authority to fill up the note for any amount. In the language of Lord Mansfield, "The indorsement of a blank note is a letter of credit for an indefinite sum." *Russell v. Langstaffe*. But this well-settled principle does not reach this case. Here the amount of the note was fixed : the note was not blank in respect to the amount. It is only the blank portions of the note which may be filled up. We have been referred to no authority which would authorize the maker to insert the words "with interest" to the note. *Kitchen v. Place*¹ merely decided that the holder of a note might insert a place of payment after the word "at" in a blank space left for that purpose. But in that case the court say that, if the word "at" had been erased, the note would have been complete without filling the blank. *Mitchell v. Culver and Mechanics' and Farmers' Bank v. Schuyler*² were cases where the date was supplied. In the first case, the day of the month was left blank, and in the last the date was omitted. The court held that filling in the day of the month in the one case and adding the date in the other were authorized by the delivery of the paper thus defective. These cases are pressed upon us as analogous, because it is said that a note is perfect without any date; and it was urged in one of these cases that, therefore, the addition of a date was an alteration. The court answered this suggestion by saying, "The defendant must have contemplated the addition of the note before the note was to be passed, for it was payable at the Mechanics' and Farmers' Bank. It is believed to be the invariable custom of banks to discount no paper without a date." The omission was regarded as a blank which might be filled up. It was suggested by the counsel for the plaintiff that interest is usually added after the place of payment; and that element being left blank authorized the addition of these words, in connection with the place of payment. This is not tenable. It is not a universal custom for notes to bear interest. Again, it is not essential nor universal to insert interest after the place of payment. If it was, the words "with interest" have no connection with the place of payment. They relate to the amount to be paid; and an authority to fill a blank for the place of payment does not include or involve an authority to insert interest. There was no blank to be filled up for the insertion of an obligation to pay interest. The insertion of those words was an alteration of the note as it existed when indorsed and delivered to the maker, and it was material; and, unless some authority can be shown besides the circumstance of the delivery of the note to the maker, it is invalid as against the indorser.

¹ 41 Barb 465.

² 7 Cow. 336, and note.

The rule that "whenever one of two innocent parties must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it," is not applicable, for the reason that the indorser did not, in any legal sense, enable the maker to make the alteration. He indorsed a note for a specific sum, which, as we have seen, conferred no authority upon the maker to change or alter it. If it did, indorsers would occupy a perilous position. An indorsement of a note of \$1,000 would authorize the maker to change it to \$10,000. It matters not whether the amount is large or small, the principle involved is the same.

The judgment must be reversed, and a new trial granted, costs to abide the event.

All concur.

*Judgment reversed.*¹

THE MARINE NATIONAL BANK, APPELLANT, v. THE NATIONAL CITY BANK, RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, NOVEMBER, 1874.

[Reported in 59 New York Reports, 67.]

APPEAL from order of the general term of the Superior Court of the city of New York, reversing a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 4 J. & S. 470.)

This action was brought to recover a sum of money alleged to have been paid by plaintiff to defendant by mistake.

The facts, as found by the referee, were in substance as follows: On the first day of December, 1869, Lunt Brothers, merchants in New York, gave to a stranger, in exchange for twenty-five dollars, a check for that amount, drawn upon plaintiff, payable to the order of Henry Smith. On the next day, a person called upon Derippe & Co., gold brokers in New York, stating that he wished to buy some gold for Lunt Brothers, and asked the price of \$3,334 gold in currency: a memorandum, giving the amount as \$4,079.96, was delivered to him. Soon after, he returned with the check above mentioned, which had been altered by erasing the date, payee and amount, and inserting date December 2, 1869, payee Derippe & Co., amount \$4,079.96. Derippe & Co. sent the check to plaintiff's bank for certification, and upon pre-

¹ Holland v. Hatch, 11 Ind. 497; Bruce v. Westcott, 3 Barb. 374, *accord*.

Conf. Patton v. Shanklin, 14 B. Mon. 15; Holland v. Hatch, 15 Oh. St. 464; Spittler v. James, 32 Ind. 202, 208. — Ed.

sensation it was duly certified; and, thereupon, Derippe & Co., without notice, and being ignorant of the alteration, and relying upon the certification, gave to the said person the sum of \$3,334 American gold, receiving in payment the certified check. Derippe & Co. indorsed the check, and deposited it the same day in the defendant's bank with which they kept an account. Their account was overdrawn to an amount less than the amount of said altered check, at the time of the deposit of the check, and that deposit made their account good. Plaintiff paid the check to defendant on the morning of the 3d of December, 1869, and on the same day, and immediately after discovering the alterations, notified defendant thereof, offered to return the check, and requested repayment of the amount. Defendant refused to repay the same. Plaintiff, when it certified and paid the check, and defendant, when it received the check on deposit and received payment, believed it to be a genuine check.

The referee found, as conclusions of law, that plaintiff did not guarantee the genuineness of the filling up of the check by certifying, and so was not estopped from showing the alteration, and was entitled to judgment for the amount paid. Judgment was entered accordingly.

Waldo Hutchins, for the appellant. When, in consequence of a mutual mistake of fact, one party has received the property of another, he must refund. *Kingston Bank v. Ettinge*.¹ The certification of a check by a bank imposes upon it no greater liability than is incurred by the acceptance of a bill of exchange. *Farmers' Bank v. B. and D. Bank*,² *Barnes v. Ontario Bank*,³ *Meads v. Merchants' Bank*,⁴ *Irving Bank v. Wetherald*,⁵ *Merchants' Bank v. State Bank*.⁶ The acceptance of a bill of exchange is not an admission or a certificate that the body of the bill is genuine. *Bank of Commerce v. Union Bank*,⁷ *Nat. Bank of Commerce v. Nat. M. Banking Ass'n*,⁸ *Espy v. First Nat. Bank of C.*,⁹ *Goddard v. Merchants' Bank*,¹⁰ *Jones v. Ryde*,¹¹ *Smith v. Mercer*; ¹² *Story on Bills*, §§ 262-264. A drawee who has paid a bill believing it to be genuine, whereas it has been fraudulently altered, can recover the amount paid, if the drawer's signature remained genuine. *Nat. Bank of Commerce v. Nat. M. Banking Ass'n*,⁸ *Bank of Commerce v. Union Bank*,⁷ *Espy v. First Nat. Bank of C.*⁹ Defendants not having had title to the check, plaintiff can recover back the money paid on it. *Bank of Commerce v. Union Bank*,¹³ *Canal Bank*

¹ 40 N. Y. 391.² 16 N. Y. 125.³ 19 N. Y. 152, 159.⁴ 25 N. Y. 143.⁵ 36 N. Y. 335.⁶ 10 Wall. 604, 647, 648.⁷ 3 N. Y. 235.⁸ 55 N. Y. 211.⁹ 18 Wall. 604.¹⁰ 4 N. Y. 147.¹¹ 5 Taunt. 488.¹² 6 Taunt. 76.¹³ 3 N. Y. 230.

v. Bank of Albany,¹ *McBride v. Farmers' Bank*.² Defendants were not *bona fide* holders of the check for value. *Coddington v. Bay*, *Stalker v. McDonald*. The acceptor of a bill speaks only to the genuineness of the drawer's signature. *Bank of Commerce v. Union Bank*,³ *Canal Bank v. Bank of Albany*.¹ A party who indorses a forged check and gives it currency must bear the loss. *Bank of Commerce v. Union Bank*,³ *Canal Bank v. Bank of Albany*.¹

Wm. Henry Arnoux, for the respondent. The certification by plaintiff was an original undertaking to pay the check, and bound it to an innocent holder. *Meads v. Merchants' Bank*,⁴ *Nassau Bank v. Broadway Bank*,⁵ *Willeys v. Phoenix Bank*,⁶ *Fire and Marine Bank v. B. and D. Bank*,⁷ *First Nat. Bank v. Leach*,⁸ *Merchants' Bank v. State Bank*,⁹ *Cooke v. State Nat. Bank*.¹⁰ Certification that a check is good is equivalent to payment. *Smith v. Miller*,¹¹ *McKleroy v. So. Bank*,¹² *First Nat. Bank v. Leach*. Plaintiff is estopped by its own acts from denying the validity of the check in question, for the amount and to the payee therein expressed. *McWilliams v. Mason*,¹³ *Con. Nat. Bank v. Nat. Bank of Commerce*,¹⁴ *Lickbarrow v. Mason*,¹⁵ *McNeil v. Tenth Nat. Bank*,¹⁶ *McKleroy v. So. Bank*,¹² *Van Duzer v. Howe*,¹⁷ *Ronsies v. Alston*,¹⁸ *Hills v. Barnes*,¹⁹ *Cooke v. State Bank*,²⁰ *Hern v. Nichols*.²¹ Plaintiff by delay in commencing this action lost the right to prosecute defendant, and its only right of action was against the payees of the check. Story on Agency, § 300; Paley on Agency, 388-391; 3 Chitty on Com. and Manuf., 213; 2 Liverm. on Agency [ed. 1818], 260, 261. Plaintiff had no right of action against defendant without returning or tendering said check. *Waterlo v. De Witt*,²² *Duffield v. Elles*,²³ *Brown v. Brown*.²⁴

Per Curiam. In order to sustain the judgment of the general term, the defendant must make out that it has parted with its money in reliance upon some assertion of the plaintiff in respect to the check, and which the plaintiff is therefore bound to make good. The whole question is, What did the plaintiff assert? Upon this question we agree with the views expressed by the learned referee. When a check is presented for certification to a bank on which it is drawn, the purpose is to ascertain, with certainty, what the bank alone can know; and

¹ 1 Hill, 287-290.⁴ 25 N. Y. 143.⁷ 16 N. Y. 125.¹⁰ 10 Wall. 115.¹³ 31 N. Y. 294.¹⁶ 46 N. Y. 329.¹⁹ 11 N. H. 395.²² 36 N. Y. 340-345.² 26 N. Y. 450-454.⁵ 54 Barb. 242.⁸ 52 N. Y. 350.¹¹ 43 N. Y. 171, 176.¹⁴ 50 N. Y. 575.¹⁷ 21 N. Y. 531.²⁰ 52 N. Y. 115.²³ 1 Bligh [N.S.], 497, 542.³ 3 N. Y. 230.⁶ 2 Duer, 130, 132.⁹ 10 Wall. 648.¹² 14 La. An. 458.¹⁵ 2 T. R. 70.¹⁸ 5 Ala. 297.²¹ 1 Salk. 298.²⁴ 18 Conn. 410.

that is, whether the drawers of the check have funds sufficient to meet it; and, further, to obtain the engagement of the bank that those funds shall not be withdrawn from the bank by the drawers of the check. To this extent the knowledge of the bank must, of necessity, enable it safely to go, in the way of assertion; and its own power over its own funds will suffice to protect it as to its obligation. But if the doctrine contended for in opposition to this view is correct, and the certifying bank is bound to warrant, not only the genuineness of the drawers' signature and the sufficiency of their credit, but also the genuineness of the check in all its parts, including the specification of the amount to be paid, and the names and identity of the payees, then obviously there must occur an immediate and complete change in the modes of doing business, which would defeat and practically put an end to the use of certified checks. For no bank, under such a rule, could safely certify a check without, in the first instance, investigating its origin and history by inquiry of its makers and payees. The burden of such inquiries could not be borne without interfering with or interrupting the other necessary business of the bank, and the practice of certifying checks would have to be abandoned, or a staff of inquirers instituted in every bank specially charged with these duties. It is plain that banks, in self-protection, would be compelled to refuse altogether to certify checks, and that this convenient and useful invention of modern business would come to an end. The mischief would arise from charging the banks with a knowledge that, in the nature of things, they cannot possess. With their responsibility limited to the facts within their knowledge, the practice imposes no burden upon banks, and subserves the convenience of commerce. No construction ought to be put on acts in the usual course of business, which will impose upon the parties interested the necessity of immediately altering it. For, as the question is, necessarily, what did the parties mean, we cannot, without violent construction, attribute to them a meaning so burdensome that it will necessitate a change of the usual way of doing business. Such a meaning we know they cannot have entertained. We have been referred to various expressions in different cases, stating in quite positive and general terms the obligation of banks upon certified checks. *Farmers' Bank v. Butchers' Bank*,¹ *First Nat. Bank v. Leach*,² *Cooke v. State Nat. Bank of Boston*.³ These are to be construed with reference to the facts disclosed in the cases. In such cases, the question has been, in various forms, whether the bank certifying a check could defend itself upon the ground of want of authority in the certifying officer, or that the

¹ 16 N. Y. 125.² 52 N. Y. 350.³ 52 N. Y. 115.

drawer had not funds. These being facts within the knowledge of the certifying bank, it was necessarily precluded from disputing its certificate. But there is no ground of reason or authority for extending the rule to matters not being especially within the knowledge of the certifying bank, such as those which form the ground, in this case, on which the bank's claim of immunity rests.

The order of the general term granting a new trial should be reversed, and the judgment entered on the report of the referee affirmed.

All concur.

*Order reversed, and judgment accordingly.*¹

WILLIAM H. TOWNE v. LEWIS RICE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 7, 8,
AND 14, 1876; FEBRUARY 2, 1877.

[Reported in 122 Massachusetts Reports, 67.]

CONTRACT, by an indorsee against Lewis Rice and William J. Harolson as makers, with a count against Rice as indorser, of the following instrument, signed "Lewis Rice, Wm. J. Harolson, Receivers," and indorsed "Lewis Rice, Receiver."

"\$11,520 $\frac{4}{100}$."

BOSTON, July 1, 1873.

"Four months after date we promise to pay to Lewis Rice, Receiver, or order, eleven thousand five hundred twenty $\frac{4}{100}$ dollars, for value received, with interest at the rate of two per cent per month after due, having deposited with the holders as collateral security, with authority to sell the same at the broker's board, or at public or private sale, at his option, on the non-performance of this promise, and without notice, twenty-three (23) receivers' certificates of indebtedness \$1,000 each of the Alabama and Chattanooga Railroad."

¹ A motion for reargument was made, but denied. The opinion of the court upon this motion has been omitted.

White v. Continental Bank, 64 N. Y. 316, *accord*.

The decision in the principal case involved two propositions, viz.: first, that one who accepts a raised bill, or certifies a raised check, is not liable upon the acceptance or certification even to an innocent holder for value; secondly, that a drawee who has paid a raised bill or check to an innocent holder for value, may recover the money so paid, as being a payment made under a mistake of fact. This second proposition is asserted also in Redington v. Woods, 45 Cal. 406; Third Nat. Bank v. Allen, 59 Mo. 310; Bank of Commerce v. Union Bank, 3 Comst. 230; City Bank v. Nat. Bank, 45 Tex. 203; in which cases there was no acceptance or certification, and in Bank of Commerce v. Nat. Building Association, 55 N. Y. 211, where the amount in the bill was altered after acceptance. — ED.

The writ was only served on Rice, whose answer contained : 1st, a general denial ; 2d, that the instrument declared on was not a negotiable promissory note ; 3d, that it was made, executed, and delivered in the city of New York, and was void under the usury laws of that State.

At the trial in the Superior Court, before Wilkinson, J., the defendant Rice contended that the instrument declared on was not a negotiable promissory note, and that he was not personally bound thereon, as his signature was that of a receiver only, but the judge ruled otherwise.

It appeared that the defendants were receivers of the Alabama and Chattanooga Railroad Company, appointed by the United States Circuit Court in Alabama, and were engaged in operating and equipping it, and in borrowing money, to be used upon the railroad, upon their notes, with certificates of indebtedness, issued under the order of said court, pledged as collateral security.

The defendant Rice was allowed, against the plaintiff's objection, to show that the note in suit was actually a New York contract, made and given there, and to impeach it for alleged usury under the statutes of New York, which were put in evidence. He also introduced evidence tending to show that he resided in Boston ; that the note in suit was executed and delivered in New York in renewal of three notes then due and payable in New York ; and that it was dated " Boston " for the purpose of avoiding the usury law of New York.

The plaintiff introduced evidence tending to show that, although the note in suit was made in New York, it was agreed that it should be dated at Boston, and that it should be a Massachusetts contract subject to Massachusetts laws ; and that the plaintiff took the note as security for a debt, before maturity and without knowledge of the circumstances under which it was made.

The judge ruled, as matter of law, and under the statutes of New York, which were introduced in evidence, that the note was absolutely void on the ground of usury, both as against the original party and any innocent holder, for value, and before maturity, and that the plaintiff could not recover against the defendant Rice, either as maker or indorser, and directed a verdict for the defendant ; and the plaintiff alleged exceptions.

R. D. Smith, for the defendant.

A. A. Ranney, for the plaintiff.¹

¹ A portion of the case relating to a question of procedure has been omitted, together with a statement of the points made by the plaintiff to meet the defence of usury. — ED.

DEVENS, J. The note in suit was made and delivered in New York, although there was evidence that it was dated at Boston with the intent that it should be a Massachusetts contract. The consideration for it was three similar notes payable in the city of New York, which had become due, and upon which a rate of interest usurious under the laws of New York had been reserved. There was no further consideration, and upon it also a usurious rate of interest was reserved. By the statutes of New York, all contracts by which a greater rate of interest than that allowed by law is taken, reserved or agreed to be taken, are void.¹ If we treat this, between the original parties, as a New York transaction in all its parts, and deem that, as between them, the validity of the contract, as affected by the legality of the transaction upon which it is founded and in which it took its inception as a contract, must be determined by the law of the State where the transaction took place, there still remains the question whether the plaintiff, who offered evidence that he had purchased this note in Boston in good faith and for full value before maturity, is so affected by those circumstances that he cannot recover.

If notes are void because tainted with usury, they are ordinarily so in the hands of an innocent indorsee, the law operating upon and attainting the contract itself, attaching thereto the consequences of the illegal act. *Bowyer v. Bampton*; *Lowe v. Waller*; *Bridge v. Hubbard*,² *Kendall v. Robertson*.³

The defendant seeks, as against an innocent purchaser in Massachusetts before maturity and without notice, to falsify and contradict the note signed by him, by proving that, although dated at Boston, where it would be valid notwithstanding the amount of interest reserved, it was actually made in New York, for the purpose of then proving, by the statutes of New York, that it is void. Unless he can be admitted to show that it was thus made, he cannot avail himself of the defence which he desires to maintain. No case to which we have been referred, or which we have been able to find, goes so far as to permit such proof.

It is contended on his behalf that *Bayley v. Taber*,⁴ is precisely in point and decisive of this question. We do not so consider it. It was there held, where a statute of this State had enacted that promissory notes of a particular description made or issued after a certain day should be utterly void, that it was competent for the makers, in an action brought against them upon notes bearing date before such day, to prove that they were in fact made and issued subsequently. The ground upon which that decision rests is, that as the legislature

¹ 1 N. Y. Stats. at Large, 725, tit. 3, § 5.

² 15 Mass. 96.

³ 12 Cush. 156.

⁴ 5 Mass. 286.

had declared notes so made or issued to be void, any other result would operate to practically annul the statute, the policy of which had been determined. The case goes so far as to hold that if, by the law of Massachusetts, such a contract as that in suit was void if made here, it might be shown by proof that, although apparently made in another State, where such a contract would be valid, it was actually made here.

This is quite a different proposition from holding that it may be shown that a contract, apparently made here, and valid if so made, may be shown to have been made elsewhere, for the purpose of then proving that it would be void by the laws there existing. In the first case, the defendant is not estopped, because the *lex loci* is to be enforced, and, for reasons of public policy, he may urge his own illegality, even against those innocent of any ; in the latter he is estopped, because no reasons of public policy require a tribunal to permit a party to contradict the instrument he has signed, in order thus to sustain foreign laws, of which it has no judicial knowledge, until they are proved to it as facts, where by so doing injustice would be done to an innocent party.

*Jordaine v. Lashbroke*¹ is the leading case upon the subject of the right of a party to a bill of exchange, to show that it was made in violation of law. The bill purported to be dated at Hamburg, but was actually made in London, and, when so made, required a stamp, for want of which it was void. It was there held, that the fact that the bill was made in London might be proved, in order that so ready a means of evading the English revenue laws might not exist. To the same effect are *Steadman v. Duhamel*,² and *Abraham v. Dubois*.³ Had the bill been sued in Hamburg, the courts of that city, under no obligation to enforce the English revenue laws, might properly have held that the defendant was estopped by the date he had affixed to the bill from showing that it was made at another place, where by a local statute it was void.

There is evidence that this note was intended to be a Massachusetts note, and bore date of Boston, in this State ; that it is signed and indorsed by the defendant, a resident of this city ; and that the plaintiff here purchased it for value and in good faith. If such prove to be the facts, the defendant should not be permitted to show, for the purpose of avoiding the note, that he made it in New York. If it is what it purports to be, it is good against any defence of usury. In order to aid in enforcing a different system from our own, the de-

¹ 7 T. R. 601.

² 1 C. B. 888.

³ 4 Camp. 269.

fendant should not be allowed to show, to the injury of an innocent party, that it is not what it purports to be.

We have not deemed it necessary to inquire whether, under the St. of 1863, c. 242, the defence of usury can properly here be made, as we are of opinion, upon the ground above stated, that the learned judge was in error in ruling, under the statutes of New York in evidence, that this note was absolutely void on the ground of usury, as against an innocent holder for value who had here purchased it before maturity, and that there could be no recovery by him.

We have discussed this question, assuming the instrument in suit to be a negotiable promissory note. It was ruled at the trial that it was so. While no exception to this ruling is brought before us, the question has been discussed, and must necessarily be now considered, as it would be superfluous to send the case back for a new trial if it is to be disposed of upon the principles which would govern it if the original parties were the parties to this suit.

The instrument sued on is a promise to pay a definite sum of money at a specified time, and, as it is payable to order and indorsed by the payee, must be considered a negotiable promissory note, unless this character is altered by that which follows the promise. An additional rate of interest is provided for if the note shall not be met at maturity; but, as the sum to be paid is still definite and payable absolutely, this cannot affect the negotiability.

The note contains also an addition, which is a recital of the fact that certain certificates have been deposited as collateral security for the payment of the note, of the terms upon which they have been deposited, and upon which they may be disposed of by the holder, who has received them. A statement that collateral security has been deposited for the performance of the promise contained in a promissory note is a recital only which does not affect its negotiability. *Wise v. Charlton*; *Fancourt v. Thorne*.¹ Nor, when the statement annexed contains also a recital of the terms upon which the deposit was made, should it have that effect. It affords evidence by which the contract might be shown, but the right to dispose of the collateral security is not derived therefrom, but from the contract which was made with the depositary of such security. Such a recital does not render the amount to be paid, the time when, or the person to whom payable, uncertain. If it did, undoubtedly the instrument would not be a negotiable promissory note. *Bolton v. Dugdale*,² *Stults v. Silva*.

The only contract as to collateral security, recited in this note, relates to what shall be done after the note becomes due, if it is un-

¹ 9 Q. B. 312.

² 4 B. & Ad. 619.

paid. If, as between the maker and the original holder who received the collateral security, there has been any payment before the note became due, by the receipt of sums collected upon the security, that cannot affect one to whom the note has been transferred before maturity, without notice. It will have been done in pursuance of some agreement which does not appear on the face of the note, and of which therefore he had no notice. He is entitled to occupy the same position that he would if the holder of a negotiable note in the ordinary form had received a sum which, as between himself and the maker, should be applied to the note, and had afterwards transferred it to him, without notice and before maturity.

Nor does the fact, if this note is unpaid, that the amount due after maturity will depend upon the action of the holder of the collateral securities, by reason of his option to sell and realize such securities, and will thus be uncertain, destroy its negotiable character before maturity. After a negotiable note has become due, it is still transferable, although it has lost the great characteristic which gives value to it as commercial paper. The purchaser, although he may sue upon it in his own name, then receives it with full notice of all defects, and subject to every equitable defence which the promisor may make against the promisee. If the note embodies a promise to pay money, definite as to time, person and amount, it is not the less negotiable, because, if unperformed at maturity, certain collateral securities, the proceeds of which will then be applicable to the note, may be realized, and, when realized, will affect the amount which will thereafter be due on it.

The case of *Arnold v. Rock River Valley Railroad*, goes much further than we are required to do, in holding the instrument sued on to be a negotiable promissory note. The instrument, there held to be such, contained not merely a recital of the fact that collateral security had been given, and of the terms upon which it had been given, but itself furnished the authority by which the holder (who was not the promisee), could dispose of it, prescribed the mode in which he should convert it into money, and defined the extent of the maker's liability, after the security should have been availed of. Whether, if the contract as to the collateral security and the sale of it had been made by the instrument sued on, it could still be treated as a promissory note, need not now be decided. The only contract made by it is a contract to pay the money promised, and it is not altered or modified by that which is recited, but continues to be an absolute promise to pay to the person named, or his indorsee, a definite sum at a fixed time. It was therefore correctly ruled at the trial, that

the promise contained in the instrument was to be treated as a negotiable promissory note.

It was also correctly ruled that the fact that the defendant was the receiver of a corporation, and so described himself, would not prevent his being sued individually. The contract was his own, and the word "receiver" annexed to his name was a *descriptio personæ* merely. *Fiske v. Eldridge*.¹

Upon the ground heretofore considered, as to the defence of usury, the

Exceptions are sustained.

¹ 12 Gray, 474.

BROWN v. REED.

IN THE SUPREME COURT, PENNSYLVANIA, OCTOBER 18, 1875.

[Reported in 79 Pennsylvania, 370.]

BEFORE Agnew, C. J., Sharswood, Williams, Mercur, Gordon, Paxson, and Woodward, JJ.

Error to the Court of Common Pleas of Erie County, of October and November term, 1874, No. 135.

This was an action of assumpsit brought January 31, 1873, by W. Reed against T. H. Brown, upon the following note : —

“NORTH EAST, April 3d, 1872.

“Six months after date, I promise to pay to J. B. Smith or order TWO HUNDRED AND FIFTY DOLLARS for value received, with legal interest, without defalcation or stay of execution.

“T. H. BROWN.”

Indorsed, “J. B. Smith, without recourse.”

The case was tried April 24th, 1874, before Vincent, P. J.

The plaintiff gave the note in evidence, and testified that he had bought it from the payee for \$220, which he paid in cash. He testified further that he had received the note *bona fide*, and rested.

The defendant then offered to prove : —

“That the paper he signed had been altered since so signed, without his knowledge or consent, and that it was obtained from him by fraud of the payee ; also, to show what took place between Smith, the payee, and himself at the time the note was made ; also, to show that the paper in suit is but the part of an agreement entered into between himself and one J. B. Smith, purporting to constitute the defendant an agent to sell ‘Hay and Harvest Grinders’ in North East and Harbor Creek townships, in the county of Erie, and that the paper making him such agent has, since it was signed by him, been cut in two without his knowledge or consent, so as to make the part in evidence read as a promissory note for \$250, and that a large part of the original instrument was cut off, and that the paper in suit is not the whole of the paper signed by defendant, nor in the shape in which he signed it, but when signed by him was as follows, to wit : —

‘NORTH EAST, April 3d, 1872. *

‘Six months after date, I promise to pay J. B. Smith or bearer fifty dollars when I sell by order TWO HUNDRED AND FIFTY DOLLARS worth of Hay and Harvest Grinders, for value received, with legal interest, without appeal, and also without defalcation or stay of execution.

‘T. H. BROWN, Agent for Hay & Harvest Grinders.’”

*

The plaintiff objected to the offer, because, admitting it all to be true, it did not constitute a defence to the note in hands of an innocent purchaser for value, before maturity; and it was not alleged that the plaintiff is not such a purchaser, nor that there was any guilty knowledge on part of the plaintiff in this case before purchase of the paper.

[The paper was divided by cutting through between where the asterisks are placed.]

The offer was rejected, and a bill of exceptions sealed for the defendant.

The court charged:—

“There is no evidence impeaching this paper as a note in the hands of the plaintiff, and your verdict therefore must be for the plaintiff for the amount of note and interest.”

The verdict was for the plaintiff for \$280.54.

The defendant took a writ of error, and assigned the rejection of his offer of evidence and the charge of the court, for error.

W. Benson, for plaintiff in error. A note once issued and then altered is void altogether. *Master v. Miller*, *Fay v. Smith*,¹ *Wade v. Withington*,² *Cock v. Coxwell*;³ *Smith's Lead. Cas.* 934. Cutting the contract into two pieces rendered the whole contract, and hence the part held by the plaintiff, absolutely void as against the maker. 2 *Parsons, Notes and Bills*, 580–582; *Chitty on Bills*, 182; *Wheelock v. Freeman*,⁴ *Wade v. Withington*,² *Fay v. Smith*,¹ *Bruce v. Westcott*,⁵ *Dewey v. Reed*,⁶ *Nazro v. Fuller*,⁷ *Warrington v. Early*,⁸ *Stephens v. Graham*,⁹ *Jardine v. Payne*,¹⁰ *Benedict v. Cowden*; ¹¹ *Story on Notes*, § 408; *Byles on Bills*, §§ 254, 256.

F. F. Marshall, for defendant in error, cited *Phelan v. Moss*,¹² *Garrard v. Haddan*.¹³

MR. JUSTICE SHARSWOOD delivered the opinion of the court, November 4th, 1875.

The learned counsel for the plaintiff in error has appealed to us to reconsider and overrule *Phelan v. Moss*¹² and *Garrard v. Haddan*,¹³ since followed in *Zimmerman v. Rote*.¹⁴ We mean, however, to adhere to those cases, as founded both on reason and authority, and as settling a principle of the utmost importance in the law of negotiable securities. That principle is that, if the maker of a bill, note, or check, issues it in such a condition that it may easily be altered without

¹ 1 Allen, 477.

⁴ 13 Pick. 165.

⁷ 24 Wend. 37.

¹⁰ 1 B. & Ad. 671.

¹³ 17 P. F. Smith, 82.

² 1 Allen, 561.

⁵ 3 Barb. 374.

⁸ 2 El. & B. 763.

¹¹ 49 N. Y. 396.

¹⁴ 25 P. F. Smith, 188.

³ 2 C., M. & R. 291.

⁶ 40 Barb. 16.

⁹ 7 S. & R. 505.

¹² 17 P. F. Smith, 59.

detection, he is liable to a *bona fide* holder who takes it in the usual course of business, before maturity. The maker ought surely not to be discharged from his obligation by reason or on account of his own negligence in executing and issuing a note that invited tampering with. These cases did not decide that the maker would be bound to a *bona fide* holder on a note fraudulently altered, however skilful that alteration might be, provided that he had himself used ordinary care and precaution. He would no more be responsible upon such an altered instrument than he would upon a skilful forgery of his handwriting. The principle to which I have adverted is well expressed in the opinion of the court in *Zimmerman v. Rote*.¹ "It is the duty of the maker of the note to guard not only himself but the public against frauds and alterations by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them, with ease and without ready detection."

But would the facts offered to be given in evidence, and rejected by the court below, have brought this case within the line of their decisions? We think not. In *Phelan v. Moss* and in *Zimmerman v. Rote*, the party signed a perfect promissory note, on the margin or underneath which was written a condition which as between the parties was a part of the contract and destroyed its negotiability. But it could easily be separated, leaving the note perfect, and no one would have any reason to suspect that it had ever existed. In *Garrard v. Haddan*, the note was executed with a blank, by which the amount might be increased, without any score to guard against such an alteration. In all these cases, the defendants put their names to what were on their face promissory negotiable notes. In the case before us on the defendant's offer, he did not sign a promissory note, but a contract by which he was to become an agent for the sale of a washing-machine. It was indeed so cunningly framed that it might be cut in two parts, one of which with the maker's name would then be a perfect negotiable note. Whether there was negligence in the maker was clearly a question of fact for the jury. The line of demarcation between the two parts might have been so clear and distinct and given the instrument so unusual an appearance as ought to have arrested the attention of any prudent man. But it may have been otherwise. If there was no negligence in the maker, the good faith and absence of negligence on the part of the holder cannot avail him. The alteration was a forgery, and there was nothing to estop the maker from alleging and proving it. The ink of a writing may be extracted by a chemical process, so that it is impossible for any but an expert to detect it; but

¹ 25 P. F. Smith, 191.

surely in such a case it cannot be pretended that the holder can rely upon his good faith and diligence. We think, then, that the evidence offered by the defendant below should have been received.

Judgment reversed, and venire facias de novo awarded.

LOUISIANA NATIONAL BANK v. CITIZENS' BANK.

IN THE SUPREME COURT, LOUISIANA, FEBRUARY, 1876.

[Reported in 3 Central Law Journal, 220.]

LUDELING, C. J. From Superior District Court for the parish of Orleans. This suit is brought by the Louisiana National Bank against the Citizens' Bank to recover the amount of a check drawn by the Bank of Mobile, purporting to be for twenty-seven hundred dollars, but which had been fraudulently raised from a smaller amount, and paid in ignorance of the forgery by the Louisiana National Bank, on which the check was drawn. The answer of the Citizens' Bank is the general issue: it avers the check was deposited in the Citizens' Bank by and for account of the New Orleans Savings Institution, which institution is called in warranty. The answer of the Savings Institution is the general issue, and the special defence that the Savings Institution took the check on deposit, and paid out on account of it upon the faith of the certification that it was "good" put upon the check by the Louisiana National Bank. There was no dispute about the facts. The bill of exchange or check was drawn by the Bank of Mobile, but the amount thereof had been raised from \$27 to \$2,700 before it was presented to the Louisiana National Bank of New Orleans for certification; and the New Orleans Savings Institution and the Citizens' Bank received and paid their money for it, after the Louisiana National Bank had certified that it was "good."

Who must bear the loss? We do not consider it important to determine whether this be a check or a bill of exchange. In the case of *City Bank v. Girard Bank*,¹ this court said: "We are unable to discover any difference between the obligation to pay a check or a bill of exchange. Both contain a request from the drawer to the drawee to pay a sum of money to the person in whose favor the check or bill is drawn. A check drawn in New Orleans, on London, would, in our opinion, be a foreign bill."

Mr. Parsons says: "The check is always considered in England as a kind of inland bill of exchange, and this language is frequently

¹ 10 La. 567.

adopted by American writers. They are much used here in drawing from one State upon houses of deposit in another; and small sums of money are frequently and very conveniently sent in this way, and it has even been suggested that these checks are foreign bills, and as such subject to protest and damages." Notes and Bills, Vol. II.

The obligation of the Louisiana National Bank to pay was the same, whether the instrument be called a check or a bill. What was the effect of the acceptance or certification of the Louisiana National Bank? Clearly, it created an engagement of the bank to pay the check, and the bank became primarily liable to any innocent holder thereof for the debt, which it had certified was "good."

Mr. Parsons says: "It is quite common in this country to present a check, not for payment, but to be marked and certified as good, . . . and then it circulates or is transmitted as cash. Checks are often certified as good in England, as well as here, and are then used and deposited as bills of the certifying bank. This marking or certifying is called, in some cases, 'acceptance,' and is said to have the same effect as acceptance." Parsons's Notes and Bills, Vol. II. p. 74.

The counsel for plaintiff says the general rule is that he who pays in error is entitled to recover back the money so paid, and he admits the exception to this rule in favor of commercial paper, when the drawee has paid; but he says that the exception applies only when the signature of the drawer is forged, as the drawee was bound to know the signature of his correspondent and whether he had funds, and that he guaranteed nothing else. It seems to us that, tested by this rule, the plaintiff cannot recover.

We have already said that, by certifying the check "good," the bank bound itself primarily to *bona fide* subsequent holders. According to the argument of the plaintiff, its act in certifying only estopped the bank from denying the signature of the drawer and the amount certified. That is all the plaintiff seeks to make the defendant responsible for.

It is the signature and the amount of the check which give it value. It is of no consequence by whom the body of the instrument was written. It often happens that a check is written by a clerk or third person, and signed by the drawer.

One of two innocent persons must suffer in this case: it would seem but just that he whose act has caused the loss should bear it. *Price v. Neal*, *Bass et al. v. Clive*, *Smith v. Mercer*.¹

By certifying the check, the bank bound itself to pay the amount which it said was good, and upon this obligation alone the defendant parted with its money.

¹ 6 Taunt. 81.

The Louisiana National Bank, by its cashier, wrote across the face of the check "good," "Eug. F. Garcia;" and, with this certification, the check, as it was when certified, was acquired by the defendant, in due course of its business, and the plaintiff paid it. We cannot perceive how the plaintiff can contend with any semblance of right that the defendant was negligent in not inquiring from the Bank of Mobile if the check was genuine. If this inquiry had to be made by any one, it seems that it should have been made by the certifying bank before it gave currency to it, and lulled suspicion and stopped inquiry by the responsibility of its certification that it was good. In the case of the *Merchants' Bank v. State Bank*, the Supreme Court said: "By the law-merchant of this country, the certificate of the bank, that a check is good, is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for the purposes of money. Thus it continues to perform its important functions, until in the course of business it goes back to the bank for redemption, and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion." 10 Wall. 647. See also *United States Bank v. Bank of Georgia*.¹

The plaintiff relies upon the cases of *McCall v. Corning*² and *Espy v. Bank of Cincinnati*³ as conclusively settling the right to recover. Neither of those cases was like the one under consideration. In the case of *McCall v. Corning et al.*, a forged draft had been sold to Britton & Co., who transferred it to *Corning et al.* before acceptance: they had parted with their money, not on credit of the drawee's acceptance, but on the faith they had in the drawer and the payee and indorser.

In the case of *Espy* there was no written certification on the check. The cashier of the bank had verbally told the clerk of *Espy, Heidelberg, & Co.*, the payee, that "it is all right; send it through the clearing-house." In this connection, the court used the following lan-

¹ 10 Wheat. 333.² 3 An. 409.³ 18 Wall. 604.

guage: "It is also to be considered that the bank was not asked to certify it in the usual way by indorsing it good, and that the party who asked information was the one whose name was in the check as payee. We do not propose to decide here what would have been the legal effect in the present case, if the bank officer had, under precisely these circumstances, been requested to indorse the check as good, and had done so, affixing his name or his initials in the ordinary way." 18 Wall. pp. 619, 620. This extract is sufficient to show that the question involved in this case was not decided in *Espy v. Bank of Cincinnati*.

The plaintiff also relies upon the case of the *Marine National Bank v. The National City Bank*, recently decided by the Court of Appeals of New York. That case differs from the present case in this: the party who had the check certified and to whom subsequently payment was made was the same whose name was in the check as payee. In the present case, the *Citizens' Bank* was not a party to the check. See also the cases of *Farmers' Bank v. Butchers' Bank*,¹ *First National Bank v. Leach*,² *Cooke v. State National Bank*.³

It is therefore ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment in favor of the defendant, rejecting the plaintiff's demand, with costs.

MR. JUSTICE WYLY dissents, and reserves the right to file his reasons.



BENJAMIN F. SWEET, RESPONDENT, v. GEORGE CHAPMAN, IMPLEADED WITH REUBEN J. GREEN, APPELLANT.

IN THE SUPREME COURT, NEW YORK, APRIL TERM, 1876.

[Reported in 7 Hun, 576.]

APPEAL by defendant Chapman from a judgment entered in favor of plaintiff upon a verdict directed by the court at the Onondaga Circuit, held in January, 1874.

R. H. Tyler, for the appellant.

Randall & Randall, for the respondent.

NOXON, J. The action in this case was upon a promissory note. The answer of the defendant Chapman denies the delivery of the note to Green, the payee, and interposes the defence of usury. It appeared on the trial that the defendant Green was the agent of a life insurance company, and that, on the 20th September, 1872, he solicited the defendant Chapman to take a policy of insurance of \$5,000 in the com-

¹ 16 N. Y. 125.

² 52 N. Y. 350.

³ 52 N. Y. 115.

pany; and that they agreed upon terms, provided the defendant Chapman passed the examination of the doctor of the company; and, for final payment of premium, the said Chapman was to give his note for \$130.63, at nine months. That thereupon (according to the evidence of Chapman) he signed the note in suit for the said sum of \$130.63, payable nine months after date, with interest, to the defendant Green or bearer, and dated the said note 20th September, 1872; and that he let the defendant Green take the note with the express understanding that it was to be of no effect, and not be binding upon him until he passed the doctor and received the policy of insurance from the company. When that was done, he was to be bound by the note, and not before. The defendant Green, a witness for the plaintiff, states that the note was delivered to him upon the condition that when Chapman passed the doctor the note was to take effect; and that nothing was said about the note not taking effect until he got his policy. Chapman states the policy was to be delivered to him, or sent to him by mail to Hinmansville; that he had never received the policy, and had often inquired for it at the post-office at Hinmansville. Green states that he was to deliver the policy to Chapman, or have it sent to Doctor Rice for Chapman, Rice being the medical examiner for the company. Chapman was examined by Rice on the 28th September, 1872: the examination was satisfactory, and the examiner passed him, and so certified to the company. In October, 1872, the plaintiff purchased the note in suit of the defendant Green, and paid him therefor, in cash, the full face of the note, at a discount of ten per cent. That when he purchased he knew nothing of the circumstances under which Green received it, or of any arrangement or agreement made between the defendants in relation to the note, and supposed it was a good and valid note. At the close of the testimony, the counsel for Chapman insisted that the evidence showed that the note had no vitality or inception until it was passed to plaintiff; and, as plaintiff purchased it at ten per cent discount, and the conditions upon which the note was handed to Green never having been performed, the note was usurious and void in the hands of the plaintiff, and requested the court to submit the question to the jury. The court decided that, as the plaintiff had purchased the note before it became due, without any knowledge of the circumstances under which it was obtained from defendant Chapman, and paid a *bona fide* consideration therefor, it was a valid note in his hands, and not obnoxious to the defence of usury, and refused to submit the case to the jury, to which ruling and decision and refusal the counsel for defendant Chapman excepted. Under the direction of the court, the jury found a verdict for the plaintiff for the amount of the note, with interest.

The rule is well settled that if the plaintiff, under the circumstances of this case, had paid the full amount of the note in question to Green, he would have been a *bona fide* purchaser, and as such protected against the agreement claimed by Chapman to have been made with Green.

The important question in the case is as to the time the note had an inception. If it had an inception at the time it was delivered to Green, or at the time Chapman passed the examination of the medical examiner, and before the sale was made to the plaintiff, then the ruling and decision of the court was correct. If, however, it had no inception, and had no existence as a note until the sale to and purchase by the plaintiff, then the note, upon such purchase, became void in the hands of the plaintiff for usury. The question of inception and as to the time it took place was a question of fact, upon which the evidence was conflicting. That question of fact was one which should have been submitted to the jury. It was the vital point in the case, and it was error in the court to refuse to submit the same, and the exception to the ruling was well taken. The decision upon the question of law, that because plaintiff purchased the note before due, without knowledge of the circumstances under which it was obtained from Chapman, and paid a *bona fide* consideration therefor, it was a valid note in plaintiff's hands and not obnoxious to the defence of usury, is erroneous. The error consisted in overlooking the fact of inception. It is true, if a note is executed and delivered by the maker to the payee in payment of a debt, and stolen from the payee and then sold to an innocent purchaser, such note in the hands of the purchaser would not be subject to the defence of usury; and the ruling and decision of the court would not in such case be erroneous. On the contrary, if, as in the case of *Hall v. Wilson*,¹ the note is stolen, prior to a delivery by the maker to some person as evidence of a subsisting debt, and then sold, the note takes its legal inception at the time of sale, and is subject to the defence of usury if it is transferred at a discount greater than that allowed by law. The note in question was handed to Green by the maker, and as between the parties conditions could be imposed that it should have no vitality until the condition had been performed. *Benton v. Martin*,² *Lovett v. Adams*.³

The rule appears to be settled that a promissory note, to be the subject of sale, must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties; and, if not valid in the hands of the payee, cannot be rendered valid by a sale to a *bona fide* purchaser, at a rate

¹ 16 Barb. 548.

² 52 N. Y. 574, 575.

³ 3 Wend. 381.

of interest exceeding seven per cent. *Hall v. Wilson*,¹ *Hall v. Earnest*,² and cases cited; *Rapelye v. Anderson*,³ *Bossange v. Ross*,⁴ *Clark v. Sisson*,⁵ *Catlin v. Gunter*.⁶ The cases cited by the respondent in *Chapman v. Rose*,⁷ *Colson v. Arnot*,⁸ do not affect the question in this case. After the argument of this cause, the attention of this court was called to a copy of the opinion, in manuscript, of the case of *Eastman v. Shaw* (argued in the Commission of Appeals in May, 1875, and not yet reported). One of the important questions in that case arose as to the time of inception of the promissory note given in that case, which had been sold before maturity for thirty-five dollars less than the amount due, and payable, by the terms of the note, to a party wholly ignorant of the circumstances attending the making, consideration, and delivery of the note. The defence interposed was usury, and the defendant claimed that the facts as to the delivery of the note and the intent to deliver should be submitted to the jury; and the court having charged, as matter of law, that the plaintiff could recover, the court held that the decision of the General Term, granting a new trial, was correct, and affirmed the judgment. Upon the authority of that case and cases therein cited, and upon the authorities herein referred to, the judgment is reversed and a new trial granted, costs to abide the event.

MULLIN, P. J., and SMITH, J., concurred.

*Judgment reversed, new trial granted, costs to abide event.*⁹

CITIZENS' NATIONAL BANK v. WILLARD RICHMOND.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER
6, 7, 1876.

[Reported in 121 *Massachusetts Reports*, 110.]

CONTRACT against the defendant as indorser of the following promissory note, signed by Lucius W. Pond as maker, and indorsed by him and the defendant: —

“\$500.

WORCESTER, MASS., Aug. 23, 1875.

“Four months after date, I promise to pay to the order of myself five hundred dollars at bank, value received.

¹ 16 Barb. 548.

² 36 Barb. 588.

³ 4 Hill, 488.

⁴ 29 Barb. 576.

⁵ 22 N. Y. 316.

⁶ 11 N. Y. 368.

⁷ 56 N. Y. 137.

⁸ 57 N. Y. 253.

⁹ *Hall v. Wilson*, 16 Barb. 548; *Eastman v. Shaw*, 65 N. Y. 522, *accord.* — ED.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, in substance as follows : —

On Aug. 23, 1875, Lucius W. Pond, of Worcester, applied to the defendant, who had indorsed notes for him before, to indorse the paper in suit, which then was written and read as above set forth. The defendant indorsed the note for Pond's accommodation. Pond thereupon, by the use of chemicals, rendered invisible the words "five hundred" and the figures "500" in the note, and wrote over the same the words "two thousand" and the figures "2,000," respectively. Pond then procured the plaintiff in the ordinary course of business to discount the note, it being changed as aforesaid, as a note for \$2,000, and the plaintiff did so. The plaintiff and its officers were entirely innocent of any fraud. Before the note came due, Pond was arrested and imprisoned for a large number of similar transactions. The plaintiff, after the maturity of the note, applied to the writing, which set forth the amount for which the note was given, a solution of nutgalls, which, as had been proved by many experiments, would restore any writing rendered invisible by the means employed by Pond, and this application revealed that the change had been made from \$500 to \$2,000. No other alteration had been made in the note. The defendant was present, and did not object when the solution was applied. When the note became due, it was duly presented for payment, was dishonored, and was duly protested, at the demand of the plaintiff, both as a \$500 note and as a \$2,000 note, and the defendant was duly notified as indorser; two notices, one treating the note as a \$500 note and one as a \$2,000 note, being sent him and received by him. The defendant did not know of the alterations made by Pond in the note, and never assented thereto.

W. S. B. Hopkins, for the plaintiff. Unless this case can be distinguished from *Draper v. Wood*,¹ it would be useless to argue that there was not such an alteration of the note in suit as to avoid it, so that no recovery could be had by the plaintiff. But there is a distinction. The contract entered into by the defendant is brought out visibly, as the facts find, unaltered either by addition to or subtraction from its terms and agreements. It was for a time veiled by a fraud by which the maker succeeded in obtaining for it four times more than its face and value; but, that veil removed, the indorser, an original promisor, and the plaintiff, the original holder for value, meet each other on the original contract unchanged. The defendant loses nothing that he did not voluntarily and for good consideration risk.

¹ 112 Mass. 315.

The plaintiff should lose no more than the extra amount it paid for the paper, by reason of the maker's fraud, over and above what the defendant's original contract was in amount. The date of the paper being unchanged, the protest and all proceedings thereon are regular.

F. T. Blackmer, for the defendant.

BY THE COURT. The defendant never made the note for \$2,000, which was the only one that the plaintiff accepted. *Fay v. Smith*,¹ *Belknap v. National Bank of North America*,² *Draper v. Wood*,³ *Wood v. Steele*.⁴

Judgment for the defendant.⁵

¹ 1 Allen, 477, 479.

² 100 Mass. 376.

³ 112 Mass. 315.

⁴ 6 Wall. 80.

⁵ *Wood v. Steele*, 6 Wall. 80; *Fay v. Smith*, 1 Allen, 477; *Draper v. Wood*, 112 Mass. 315; *Holmes v. Trumper*, 22 Mich. 427; *Fulmer v. Seitz*, 68 Pa. 237, *accord*. *Graham v. Gillespie* (Court of Session), Jan. 27, 1795, *contra*. — ED.

SECTION IV. — *Continued.**Purchase for Value without Notice — (continued).*(b) VALUE.¹

SMITH v. DE WITTS.

IN THE KING'S BENCH, EASTER TERM, 1825.

[Reported in 6 Dowling & Ryland, 120.]

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange. Plea, *non assumpsit*. At the trial before Abbott, C. J., at the Middlesex sittings after last term, after the plaintiff had proved the usual *prima facie* case, the defence set up was, first, that the defendant had accepted the bill without consideration; and, second, that it had been deposited by the defendant in the hands of a person named Crozar for the defendant's personal benefit, but had wrongfully been indorsed to the plaintiff. The facts proved in evidence for the defendant were these: The defendant had placed the bill in the hands of Crozar for the purpose of getting it discounted and delivering the money over to him, De Witts. Crozar had become indebted to the plaintiff for goods sold and delivered, and after becoming bankrupt went abroad with the bill in question in his possession. The plaintiff, who was ignorant of the fact of Crozar having committed an act of bankruptcy, followed him to Paris in order to obtain payment of the goods which he had sold, and there obtained from him the bill in question in satisfaction of the debt. Under these circumstances, the Lord Chief Justice was of opinion that the plaintiff had no title to sue upon the bill. His lordship said that, if the plaintiff had sold Crozar the goods upon the credit of the bill, it would have made a difference, and would have entitled him to recover; but, inasmuch as the goods had been originally furnished to Crozar upon his own personal credit, the action must fail, it appearing in evidence that the bill had been given to the latter, not for his own benefit, but for the benefit of the defendant from whom he received it. The plaintiff was therefore nonsuited.

¹ Although the doctrine of "purchase for value without notice" is pre-eminently a doctrine of the courts of equity, and even in the courts of common law is not confined to cases governed by the law-merchant, it has nevertheless acquired such prominence in its application to the transfer of negotiable securities that it has seemed expedient to make the subjects of "Value" and "Notice" special topics in this collection of cases. — ED.

F. Pollock now moved for a rule to show cause why a new trial should not be granted on the ground that the learned judge had erroneously ruled the point at *Nisi Prius*. He contended that, if the plaintiff could not maintain this action, it would be carrying the doctrine of *Gill v. Cubitt* to an unreasonable extent, and to an extent highly prejudicial to the interests of commerce. He insisted that the plaintiff must be considered as a *bona fide* holder for valuable consideration, inasmuch as he received it in payment of a debt justly due and owing to him, and therefore whether the acceptance was, merely for accommodation, fraudulently paid away, or even stolen by Crozar, could make no difference as to his legal title to sue the acceptor.

ABBOTT, C. J. The facts of this case lie in a very narrow compass. It must be admitted that the bill was accepted by the defendant without value. Crozar had it at one time from the defendant, with directions to pay it over to a third person for the use of the latter. He contrives to get it back again into his own hands, and he runs away from this country in debt. He is pursued by the plaintiff, to whom he owes money. The plaintiff finds him out in Paris, and gets from him all the securities he can, and among others this bill. It cannot be denied that, if the bill was accepted for value, the plaintiff could never have recovered upon it, because, Crozar being at that time a bankrupt, it would have passed to his assignees.¹ Can it be said that this bill, which is of no value, inasmuch as it passed from the defendant without consideration, and he being unlawfully deprived of it, the plaintiff has a right to sue upon it and place himself in a better situation than the man of whom he received it? It appears to me that it would be contrary to the first principles of natural justice to say that this plaintiff is a *bona fide* holder for value.

HOLROYD, J.² I agree that if this bill had been delivered to a *bona fide* holder for valuable consideration, and a person ignorant of the circumstances under which it had been obtained by Crozar, he might sue the acceptor, notwithstanding any want of consideration received by him. But the argument goes a great deal farther, for it assumes

¹ *Barwell v. Ward*, 1 Atk. 260; *Batson v. Goodwin*, 12 Mod. 50; *Pinkerton v. Adams*, 2 Esp. 611; *Thomason v. Frere*, 10 East, 418; *Willis v. Freeman*, 12 East, 656; *Smith v. Chandler*, 3 Gray, 392 (*semble*), *accord*.

Conf. *Willis v. Bank of England*, 4 A. & E. 21.

By the English Bankruptcy Act, 32 & 33 Vict. c. 71, § 17, the property of the bankrupt vests in the registrar "immediately upon the order of adjudication being made;" by the United States Bankrupt Law, U. S. Rev. St. § 5044, the bankrupt's property vests in the assignee from the time of petition filed. Accordingly, even a purchaser for value without notice can acquire no title, to negotiable paper transferred by a bankrupt after these respective dates. *In re Lake*, 3 Biss. 204; 6 B. R. s. c. — ED.

² Bayley, J., was absent.

that Crozar was not a bankrupt at the time plaintiff received the bill. Now at that time Crozar, assuming that he had possessed himself of the bill rightfully, had no authority to transfer a right to the plaintiff by indorsement. The plaintiff cannot be in a better situation than the person from whom he derived title. Assuming that the assignees might have recovered it, it is clear that the plaintiff had no title, because at that time the property in the bill, if Crozar had any, vested in the assignees.¹

LITTLEDALE, J., concurred.

*Rule refused.*²

POIRIER AND ANOTHER *v.* MORRIS AND OTHERS.

IN THE QUEEN'S BENCH, MAY 3, 1853.

[*Reported in 1 Weekly Reporter*, 349.³]

THIS was an action on a foreign bill of exchange. The cause was tried before Lord Campbell at the sittings after Michaelmas term, and a verdict taken for the plaintiffs subject to a special case. The plaintiffs were merchants residing in Paris, the defendants merchants in London. From the case it appeared that a firm of Hovey, Williams, & Co., of Boston, in America, who were correspondents of the plaintiffs, had also correspondents in London carrying on business under the name of Coates & Co. In 1847, in consequence of Hovey & Co. having remitted to Coates & Co. bills of exchange which they had negotiated, C. & Co. had in their hands a sum of money amounting to £738 13s. The plaintiffs having written to Hovey & Co. requesting a remittance of money on their account, J. Chandler, a partner in the firm of Hovey & Co., wrote to the plaintiffs, informing them that he had written to C. & Co., London, requesting them to negotiate certain bills in their hands belonging to Hovey & Co., and from the proceeds to remit to the plaintiffs the sum of 20,000 francs, which, when received, they (the plaintiffs) were to place to the account of H. & Co. On the 28th October, Chandler again wrote to the plaintiffs, saying, "I have requested C. & Co. to make you a remittance, which they will do in a few days." Chandler had also written to C. & Co. requesting them to remit the 20,000 francs to the

¹ "The assignees had got possession of the bill from the plaintiffs; but, finding they had no title on it against the defendant, had returned it." Ry. & M. 212, s. c., reported on another point. — ED.

² *De la Chaumette v. Bank of England*, 9 B. & C. 208, 217 (*semble*); *Cranch v. White*, 1 B. N. C. 414, *accord*.

See *Vallance v. Siddel*, 2 Nev. & P. 78; *Foster v. Pearson*, 1 C. M. & R. 849, 857; *Branch v. Roberts*, 1 B. N. C. 469 — ED.

³ 2 E. & B. 89, s. c. — ED.

plaintiffs on the 29th October, 1847. C. & Co. in their own name purchased in the ordinary way, through their brokers, the bill on which this action was brought. The bill was drawn by the defendants on A. Dassier, of Paris, for 19,478 francs, payable to the order of the plaintiffs five days after date. The price of this bill and the brokerage amounted to £738 13s. 1d. This bill was handed over to C. & Co. on the same day, and was to be paid for according to the custom of merchants in the city of London on the next foreign post-day, which in this case would be on the 2d of November. Coates & Co. wrote to the plaintiffs on the 29th, enclosing them the bill in question. On the 1st November (the bill being then unpaid), C. & Co. became bankrupts. The bill never was accepted, and this action was brought by the plaintiffs against the defendants as drawers. The defendants, in consequence of C. & Co.'s bankruptcy, had never received any value for the bill. Chandler's letters were objected to on the trial as inadmissible. The questions for the opinion of this court were as to the admissibility of these letters of Chandler's, and, if so, whether upon the facts the plaintiffs were entitled to recover in this action against the defendants.

Bramwell, Q. C., and *Ashland*, for the plaintiffs.

Crowder, Q. C., and *Briggs*, for the defendants.

LORD CAMPBELL, C. J. I am of opinion that when this bill was dishonored Poirier & Co. had a right of action upon it against the defendants as the drawers, which right they have retained down to the present time, because, if they once had a right, nothing had been done between the plaintiffs and defendants to alter that right. We must then see what interest Poirier & Co. obtained in the bill when they received it, — whether there was a consideration for it. I think that there was. The plaintiffs were creditors of H. & Co.; they pressed for a remittance; H. & Co. say they shall have a remittance, and they direct this remittance to be made through C. & Co., who were the debtors of H. & Co. When this bill was received by the plaintiffs on the 30th October, they became the *bona fide* holders of the bill for value on account of the debt due to the plaintiffs from H. & Co.: there was, therefore, a good consideration for the bill. The plaintiffs were entitled, if the bill had been accepted by the drawee; and they had a right to sue the defendants as drawers, although Dassier refused to accept it. Now, there is nothing to distinguish this from the cases where a creditor receives a negotiable security as security for a debt due, and such an antecedent debt being held to be sufficient consideration to make him a *bona fide* holder of the bill; the plaintiffs have therefore a right of action on this bill. I think that H. & Co. could have sued the defendants on this bill: there was a

good consideration as between H. & Co. and Coates & Co. The latter are not to be considered merely as the agents of H. & Co. in the sense contended ; for they were merchants in London, and were correspondents of H. & Co., and, having funds in their hands of H. belonging to H. & Co., they are to remit to P. & Co. the plaintiffs. C. & Co. never acted as the servants of H. & Co., and the defendants could have had no remedy against them on the bill, as they gave no authority to C. & Co. to pledge their credit : the credit in this case was clearly given by the defendants to Coates & Co., they looked upon them as their debtors, and they had no remedy against H. & Co., although they may have been in fact the principals of C. & Co. The defendants ran the risk of C. & Co. becoming insolvent before the second foreign post-day, and therefore in every point of view the plaintiffs are entitled to recover upon this bill.

WIGHTMAN, J. I am of the same opinion. H. & Co., being merchants in America, and C. & Co., being their correspondents in London, are to dispose of certain funds the produce of certain bills in their hands, and the balance is to be remitted to the plaintiffs in Paris. Chandler, in pursuance of these instructions, writes to the plaintiffs, and tells them that Coates & Co. will make them a remittance in a few days. For that purpose, Coates & Co. purchase in the ordinary course of business a bill drawn by the defendants payable to the plaintiffs' order. In this transaction, C. & Co. act only as principals with the defendants, and in that view of the case there can be no doubt that H. & Co. could not have been made liable on the failure of C. & Co.; nor would they be bound as the principals of C. & Co. in any question between them and the defendants. But it is quite clear that the defendants intended to give credit for payment of the bill to C. & Co. according to the usage of merchants. C. & Co. had no authority to pledge the credit of H. & Co. on this bill, H. & Co. having already funds in C. & Co.'s hands : the plaintiffs became holders of this bill for value, as it was sent to the plaintiffs on account of the debt due to them, and for payment of which they had pressed. The right to sue on the original debt was not suspended, but they were entitled to hold the bill if they thought fit : if that be so, whatever may have been the relation between the defendants and H. & Co., and C. & Co., who were the mere agents of H. & Co., the plaintiffs could sue as holders for value, and it does not appear that they have done any thing inconsistent with this subsequent to the date of the receipt of the bill. The plaintiffs held the bill, it may be, as collateral security only, but at all events for value.

ERLE, J. The plaintiffs on the receipt of this bill became *bona fide* holders for value with all rights incident to that character. We have

no evidence that C. & Co. had authority to pledge the credit of H. & Co. in purchasing this bill: they were agents to transmit a sum of money to the plaintiffs on account of H. & Co., but that is a very different thing from saying that they were agents in the purchase of this bill, and thus making them liable upon it.

CROMPTON, J. The defendants have to make out two points: first, that in purchasing this bill C. & Co. acted merely as agents; and, secondly, that there was no consideration for the bill; but in both these points the defendants have entirely failed. It does not appear that H. & Co. authorized C. & Co. to pledge their credit, but the presumption is rather the other way; and it certainly appears that the plaintiffs were holders for good consideration. It was placed by the plaintiffs to the credit of H. & Co., but the plaintiffs still retain all their legal rights upon it.

Judgment for plaintiffs.



CURRIE AND OTHERS v. MISA.

IN THE EXCHEQUER CHAMBER, FEBRUARY 11, 1875.

[*Reported in Law Reports, 10 Exchequer, 153.*]

APPEAL by the defendant against the decision of the Court of Exchequer, refusing to grant a rule *nisi* to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, or a nonsuit.

The action was brought to recover £1,999 3s. upon a check of the defendant and interest thereon.

The declaration stated that the defendant, on the 14th of February, 1873, by his check or order for the payment of money directed to Messrs. Barnetts, Hoares, Hanburys, & Lloyd, bankers, required them to pay to F. de Lizardi & Co., or bearer, £1,999 3s., and that the plaintiffs became the bearers of the said check, and the same was duly presented for payment, and was dishonored, whereof the defendant had due notice, but did not pay the same.

Pleas: 1. Denial that the plaintiffs became the bearers of the said check, as alleged.

3. That there never was any consideration for the making or payment of the check by the defendant, and that F. de Lizardi & Co. delivered the check to the plaintiffs, to hold the same as the agents of and on account of F. de Lizardi & Co., and not as bearers or transferees thereof. And that the plaintiffs presented the check for payment to the defendant, as such agents, for and on account of F. de Lizardi & Co., and not as the bearers or transferees thereof. And that

when the check was presented for payment to the defendant, and dishonored by him, the plaintiffs had notice that there never was any consideration for the making or payment of the check by the defendant.

4. That the defendant was induced to draw the check and to deliver the same to F. de Lizardi & Co. by the fraud of F. de Lizardi & Co., and that the plaintiffs were and are the bearers of the check, and have always held the same without giving any consideration for the same.

5. That there never was any consideration for the defendant's making or paying the check, and that the plaintiffs became and are the bearers of the check, and have always held the same without having given any consideration for the same.

Issue, and demurrer to third plea, and joinder.

The cause was tried at the London sittings at Guildhall, after Michaelmas term, 1873, before Kelly, C. B., when the following facts were proved :—

The plaintiffs are bankers, carrying on business in Lombard Street, London, under the firm of "Glyn, Mills, Currie, & Co." The defendant is a wholesale wine-merchant, carrying on business in London and at Xerez, near Cadiz, in Spain. Joseph Javier de Lizardi was a general merchant, who was a partner of, or traded under the firm of, "F. de Lizardi & Co.," which was established in London, and carried on a very extensive business with East Spain and the Continent generally, and dealt largely in bills upon foreign countries. In the month of February, 1873, the plaintiffs were, and for more than thirty years previously had been, the bankers of F. de Lizardi & Co., whose credit was extremely high. They had two accounts with the plaintiffs; namely, a loan account and a drawing account, and, down to the month of December in that year, usually had a considerable balance in the plaintiff's hands. Early in 1873, Lizardi began to get into difficulties; and, on the 3d of February in that year, he overdraw his drawing account with the plaintiffs, being then, and having for some time previously been, also indebted to them on his loan account. From the 3d of February down to the 12th, 1873, he obtained large additional advances from the plaintiffs upon securities of various kinds deposited with them; and on the 12th of February, at the close of the day, Lizardi was indebted to the plaintiffs in the sum of £83,436 13s. 8d., of which £49,000 was due on the loan account and £34,436 13s. 8d. upon the drawing account.

Early in February, 1873, the defendant was at Xerez, near Cadiz, in Spain; and on the 11th of February, being desirous of having a remittance of about £2,000 made from London to Cadiz, he, on that day, by telegraph, instructed Mr. Pritchett, who had the general management of the defendant's business in London during his absence, to pur-

chase from Lizardi drafts on Cadiz to about the sterling value of £2,000. Accordingly, on the same day, Tuesday, the 11th of February, Mr. Pritchett instructed Mr. Goodban, the defendant's bill broker, to apply to Lizardi for drafts on Cadiz to the amount of about £2,000. Mr. Goodban thereupon, on the same Tuesday, effected a contract between Lizardi and the defendant for the sale or delivery by Lizardi to the defendant of drafts to the amount of about £2,000 sterling, at an agreed rate of exchange, from London to Cadiz, to be at fifteen days' date, and delivered the usual contract notes to the respective parties.

In the afternoon of the same day, the 11th of February, in pursuance of the above-mentioned contract, a clerk in the employment of Lizardi left at the defendant's office in London four drafts dated on that day, drawn by Francisco Lizardi in the name of F. de Lizardi & Co., upon Mr. Manuel Paul, Cadiz, for an amount in Spanish money equivalent, at the aforesaid rate of exchange, to £1,999 3s. These drafts were forwarded by the evening post of the same day to the defendant at Xerez, near Cadiz.

It is customary in London to pay for drafts and bills on foreign countries, purchased or obtained through a bill broker, on the post-day next after the day of the contract. There are two post-days; namely, Tuesday and Friday, in each week: consequently, according to the usual course of business, the purchase or consideration money for the four drafts so contracted for on Tuesday, the 11th, was payable on Friday, the 14th, of February.

After banking hours on the 12th of February, the plaintiff, Bertram Wodehouse Currie, who for many days previously had been urgently pressing Lizardi to reduce the amount of his indebtedness to the plaintiffs, and who on that day, for the first time, suspected (as the fact was) that some of the securities deposited with the plaintiffs were not genuine, had an interview with Lizardi, and represented to him that he had a suspicion that some of the securities were not genuine, and again pressed Lizardi to reduce his balance. Lizardi assured Bertram Wodehouse Currie that he was mistaken in his suspicions, and handed him a list of the securities, detailing their values, and showing a large margin over the plaintiffs' advances. Bertram Wodehouse Currie still pressed Lizardi to reduce his debt.

In the course of Thursday, the 13th of February, Lizardi paid into the plaintiffs' bank, to the credit of his drawing account, the sum of £6,925 5s. 8d., in two checks for £425 5s. 8d. and £6,500; and, about two o'clock on that day, he handed to Currie, in the plaintiffs' bank parlor, in Lombard Street, the following document, partly written and partly printed, impressed with a penny stamp:—

"LONDON, 14th February, 1873.

"M. MISA, ESQ., 41 CRUTCHED FRIARS.

"Please to pay to Messrs. Glyn, Mills, & Co., or bearer, the sum of nineteen hundred and ninety pounds three shillings, for bills negotiated to you last post.

"£1,999 3s.

F. DE LIZARDI & Co."

The words in the document, "for bills negotiated to you last post," refer to the four drafts previously mentioned. The plaintiffs, however, did not know by or upon whom the bills were drawn, but supposed that the money was due from the defendant to Lizardi for bills negotiated.

Bertram Wodehouse Currie deposed at the trial that it was usual for Lizardi to sell bills on the Exchange, and then to draw an order, like that above set out, on the purchaser of the bills, and that that is the course of business when bills are sold; and that such orders are sometimes accepted by writing "accepted" across them,—that is, by the person on whom they are drawn writing his name across the paper, making it payable at his bankers.

In the course of the same day, Thursday, the 18th of February, checks drawn and bills payable by Lizardi, to the amount of £8,326 3s. 7d., were presented to the plaintiffs' clerk, at the bankers' clearing-house in London, for payment, and were left in the ordinary course of business in his hands. Bankers do not after 4 P.M. receive any check or bill for presentation at the clearing-house; but they have the option of refusing to pay any check or bill which may have been presented for payment during the day, and returning the same, unpaid, up to 5 P.M.

Shortly before 5 P.M. of the same Thursday, the plaintiffs gave orders to their clerk at the clearing-house not to pay the checks or bills of Lizardi, which had been presented to the plaintiffs for payment in the course of the day, and thereupon the whole of them were returned unpaid; and Lizardi, in this manner, stopped payment. In fact, the plaintiffs did not honor any checks or bills of Lizardi, or pay any thing on his account, after the 12th of February.

On Friday morning, the 14th of February, one of the plaintiffs' clerks left at the defendant's office in London a notice upon a printed form, of which the following is a copy:—

"Light gold cannot be received. A bill on [M. Misa] for [£1,999 3s. 0d.], drawn by [De Lizardi & Co.]¹ lies due at Messrs. Glyn, Mills, & Co., No. 67 Lombard Street. Please to call between two and four o'clock, and on Saturdays before three."

¹ The words and figures in brackets were written.

Between 2 P.M. and 3 P.M. of the same Friday, the plaintiffs sent one of their messengers to the defendant's office in London, with the document dated February 14th, to inquire whether it would be paid. The messenger saw Mr. Pritchett, the defendant's manager, who stated that it would be paid; offered to give the messenger a check for the amount, and with indignation asked "why the question was asked." The messenger replied that he did not know, and that he was not authorized to take the check. The messenger, taking back with him the document, then returned to the plaintiffs' bank, and there reported what had taken place at the defendant's office.

About an hour after the plaintiffs' messenger had left the defendant's office, Mr. Pritchett drew a check in the defendant's name upon his bankers, Barnetts, Hoares, Hanburys, & Lloyd, for the sum of £1,999 3s., payable to F. de Lizardi & Co., or bearer, which is the check sued on, and sent the same to the plaintiffs' bank by a clerk, who, shortly before 4 P.M. of the same day, Friday, handed the check to a clerk in the plaintiffs' bank, and received the document dated February 14th in exchange; and thereupon the amount of the check was entered in the plaintiffs' books to the credit of Lizardi.

The plaintiffs, upon receiving the defendant's check, sent the same to the clearing-house, where, about 4 P.M. on the same day, it was presented for payment, and handed to a clerk of Barnetts, Hoares, Hanburys, & Lloyd.

At the time Mr. Pritchett sent the defendant's check to the plaintiffs' bank, he did not know that Lizardi had stopped payment; but, being very soon afterwards informed of the fact, he at once instructed the defendant's bankers not to pay the defendant's check, and the same was accordingly refused payment, and returned unpaid to the plaintiffs before 5 P.M. on the 14th February, and the amount thereof was, on the morning of the following day, entered in the plaintiffs' books to the debit of Lizardi.

Up to this time, the plaintiffs did not know whether Lizardi was solvent or not. At an interview which the plaintiff, Bertram Wodehouse Currie, had with him on the said 14th of February, he protested that he was solvent. This statement was doubted by Bertram Wodehouse Currie.

Shortly after the 13th of February, when Lizardi stopped payment, he absconded, and was subsequently adjudicated a bankrupt, his liabilities amounting to upwards of a million sterling, and his assets amounting to very little indeed.

The document dated February 14th has never been returned to nor demanded by the plaintiffs, and is still in the possession of the defendant.

The following admissions in writing were made by the parties before the trial; namely, that the four drafts purchased by the defendant from Lizardi as afore-mentioned were duly presented for payment to Manuel Francisco Paul, at Cadiz, on whom they were respectively drawn by F. de Lizardi & Co. on the day they respectively became due; and that they were then and there respectively refused payment, and were respectively dishonored by Manuel Francisco Paul, and upon the grounds (but without admitting the truth of the grounds) stated in the protest of the 27th of February, 1873; and that the bills were then and there duly protested for non-payment; and that the above facts, as also the bills and protests, might be given in evidence without calling any witness or witnesses to prove them or any of them.

Some of the securities deposited by Lizardi with the plaintiffs were found to be forgeries, some worthless, and others cannot be realized. The plaintiffs have realized a portion of the said securities which were good; and, taking into account the value of the residue, which cannot now be realized, the balance which will ultimately be due from Lizardi to the plaintiffs will be about \$20,000.

It was contended on behalf of the defendant, at the trial, that there was a total failure of consideration as between the defendant and Lizardi for the check sued on, and that the plaintiffs were not holders thereof for value; but the learned judge ruled upon the above facts (neither party desiring that any question should be left to the jury) that the plaintiffs were entitled to recover, and directed the jury to find a verdict for the plaintiffs for £2,090, the amount of the check and interest thereon; and a verdict for that amount was thereupon entered, with leave to move to enter a nonsuit.

In Hilary term, 1874 (January 14th), the defendant moved the Court of Exchequer, pursuant to the leave reserved, for a rule calling upon the plaintiffs to show cause why the verdict entered for them should not be set aside, and a verdict entered for the defendant, or a nonsuit.

The Court (Kelly, C. B., Pigott and Cleasby, BB.) refused a rule and the defendant appealed.

The Court of Appeal is to be at liberty to draw inferences of fact from the facts above stated.

The question for the opinion of the Court of Appeal is whether a rule *nisi* ought to have been refused or granted.

Dec. 3, 1874. *W. Williams*, Q. C. (*Cohen*, Q. C., and *Wood Hill* with him), argued for the defendant.

J. Brown, Q. C. (*Murray* with him), for the plaintiff.

The course of the arguments sufficiently appears from the judgment. The following cases were referred to: *Crofts v. Beale*, *Young v.*

Cole,¹ Swift v. Tyson, Brandao v. Barnett,² Percival v. Crampton,³ Poirier v. Morris, Watson v. Russell,⁴ Whistler v. Forster, Parsons on Notes and Bills, Vol. I. p. 218.

Cur. adv. vult.

Feb. 11, 1875. The judgment of the Court (Keating, Lush, Quain, and Archibald, JJ., Lord Coleridge, C. J., dissenting) was delivered by

LUSH, J. This is an action on a check, dated the 14th of February, 1873, drawn by the defendant on Messrs. Barnett, Hoare, & Co., for payment of £1,999 3s. to Lizardi & Co., or bearer. The material plea is the fifth, which alleges that there never was any consideration for the defendant's making or paying the check, and that the plaintiffs have always held the same without having given any consideration.

We think it must be assumed on the facts stated in the case that, if the action had been brought by Lizardi, the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question, therefore, is whether, under the circumstances stated, the plaintiffs are to be considered the holders of the check for value.

The material facts bearing on this question may be briefly stated. The defendant had purchased of Lizardi & Co. bills on Cadiz, which were delivered to him on the 11th of February, and which, according to the usual course of business, were to be paid for on the next post-day, the 14th. Lizardi was at this time largely indebted to the plaintiffs, who were his bankers, on both his drawing account and a loan account; and he had for several days previously to and again on the 12th of February been pressed for payment or further security. On the 14th, he paid in various checks on account of the balance, and at the same time handed to the plaintiffs the document set out in paragraph 13 of the case, which is designated a "bill."

On the morning of the 14th, notice of this "bill," described as lying due at the plaintiffs', was left at the defendant's office; and, shortly afterwards, the check in question was paid in by the defendant to the plaintiffs' bank, and the "bill" given up to him in exchange for it. The amount of the check was, together with the other checks paid in by Lizardi, entered to the credit of Lizardi's account; and a large balance still remained owing to the plaintiffs. Soon after paying in the check, the defendant heard that Lizardi had stopped payment; and he at once instructed his bankers not to honor the check. In consequence of this, the check was returned from the clearing-house in the after-part of the day; and, on the following morning (the 15th), it was entered in the plaintiffs' books to the debit of Lizardi's account.

¹ 3 Bing. N. C. 724.

² 6 M. & G. 667, 668.

³ 2 C. M. & R. 180.

⁴ 3 B. & S. 34.

The court below, in giving judgment for the plaintiffs, proceeded, partly at least, upon the special circumstance that the check was given to take up the so-called "bill," and considered that this of itself formed a sufficient consideration to entitle the plaintiffs to recover. The argument before us, however, was addressed almost entirely to the broader question; namely, whether an existing debt formed of itself a sufficient consideration for a negotiable security payable on demand, so as to constitute the creditor to whom it was paid a holder for value. As this is a question of great and general importance, and as our opinion upon it is in favor of the plaintiffs, we do not think it necessary to say more with reference to the special circumstances adverted to than that we are not prepared to dissent from the view taken upon this question by the court below.

It will, of course, be understood that our judgment is based upon what was admitted in the argument; namely, that the check was received by the plaintiffs *bona fide*, and without notice of any infirmity of title on the part of Lizardi. We therefore, for the purpose of the argument, regard the so-called "bill" as merely an authority to the defendant to pay the amount to Lizardi's bankers, instead of paying it to him, and treat the transaction as if the check had been paid to Lizardi, and he had paid it to the plaintiffs, not in order that he might draw upon it, but that it should be applied *pro tanto* in discharge of his overdrawn account.

It was not disputed on the argument, nor could it be, that if, instead of a check, the security had been a bill or note payable at a subsequent date, however short, the plaintiffs' title would have been unimpeachable. This has been established by many authorities, both in this country and in the American courts. It has been supposed to rest on the ground that the taking of a negotiable security payable at a future day implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security. The counsel for the defendant accordingly contended that where the security is a check payable on demand, inasmuch as this consideration is wanting, the holder gains no independent title of his own, and has no better right to the security than the debtor himself had.

We should be sorry if we were obliged to uphold a distinction so refined and technical, and one which we believe to be utterly at variance with the general understanding of mercantile men. And, upon consideration, we are of opinion that it has no foundation either in principle or upon authority.

Passing by for the present the consideration of what is the true

ground on which the delivery or indorsement of a bill or note payable at a future date is held to give a valid title to a creditor in respect of a pre-existing debt, and assuming that it is the implied agreement to suspend, it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. *Com. Dig., Action on the Case, Assumpsit, B. 1-15.*

The holder of a check may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately, he is safe. The maker of the check cannot afterwards repudiate, and claim back the proceeds, any more than he could claim back gold or bank-notes if the payment had been made in that way instead of by check. This was decided in *Watson v. Russell*,¹ with which we entirely agree. In very many, perhaps in the great majority of cases, checks are not presented till the following day, especially where they are crossed; and this usage is so far recognized by law that the drawer cannot complain of its not having been presented before, even though the banker stop payment in the interval. The loss in such a case falls on the drawer of the check, and not on the holder.

It cannot, we think, be said that a creditor who takes a check on account of a debt due to him, and pays it into his banker that it might be presented in the usual course, instead of getting it cashed immediately, does not alter his position, and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over. If this subject were worth pursuing, it would not, we think, be difficult to show that there is no sound distinction between the two kinds of securities of which we have been treating. In the course of the argument, it was put to the learned counsel for the defendant whether a debtor who gave his own check in payment of a pre-existing debt could defend an action upon it on the ground that the creditor was not a holder for value, and Mr. Watkin Williams admitted that his argument must go to that extent; and yet it has always been the practice to sue in such a case on the check as well as on the original debt, and no such defence has, as far as we are aware, ever been attempted to be set up, certainly not successfully.

But it is useless to dilate on this point; for, in truth, the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend

¹ 3 B. & S. 34.

his remedies. The true reason is that given by the Court of Common Pleas in *Belshaw v. Bush*¹ as the foundation of the judgment in that case; namely, that a negotiable security given for such a purpose is a conditional payment of the debt, the condition being that the debt revives if the security is not realized. This is precisely the effect which both parties intended the security to have; and the doctrine is as applicable to one species of negotiable security as to another: to a check payable on demand as to a running bill or a promissory note payable to order or bearer, whether it be the note of a country bank which circulates as money, or the note of the debtor, or of any other person. The security is offered to the creditor, and taken by him as money's worth; and justice requires that it should be as truly his property as the money which it represents would have been his, had the payment been made in gold or a Bank of England note. And, on the other hand, until it has proved unproductive, the creditor ought not to be allowed to treat it as a nullity, and to sue the debtor as if he had given no security. The books are not without authorities in favor of this view, although the point has not, as far as we are aware, been directly decided. Story lays it down in his work on Promissory Notes, § 186, that a pre-existing debt is equally available as a consideration as is a present advance or value given for the note, without suggesting any distinction between a note payable after date and one payable on demand; and the cases of *Poirier v. Morris*, *Watson v. Russell*,² before cited, *Whistler v. Forster*, and others, contain clear expressions of opinion the same way.

On the part of the defendant, the case of *Crofts v. Beal* was strongly relied on, where it was held that a promissory note given by a surety for payment on demand without any new consideration was *nudum pactum*. It is sufficient to say of that case that the note was payable to the plaintiff, and not to order or bearer, and was not therefore a negotiable security. *De la Chaumette v. Bank of England*³ appears at first sight to be more in point: but there, although it appeared as between the plaintiff and O., by whom the bank-note in question was remitted, that the state of account was in favor of the plaintiff, it is not really so; for the note had not been remitted in payment, but merely for collection as agent; and the court held that, under these circumstances, the plaintiff had no better title than O. For these reasons, we are of opinion that a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand, and that, therefore, the judgment of the court below ought to be affirmed.

¹ 11 C. B. 191.

² 3 B. & S. 34.

³ 9 B. & C. 208.

My brother Quain, who concurs in the judgment, desires to add that he does not adopt all the reasoning as to consideration.

LORD COLERIDGE, C. J. In this case, I am unable to assent to the conclusion at which the other members of the court have arrived. I am painfully conscious of the great weight of authority against me; but, as at last I remain unconvinced, it is my duty to say so, and also shortly to say why.

I need not repeat, because I entirely assent, and cannot add to the statement of the facts of the case, with which the judgment prepared by my brother Lush sets out.

I proceed to consider the law, assuming the perfect correctness of the facts as stated by him, and being of opinion that on those facts the fifth plea is made out, and that the defendant is entitled to our judgment.

It is important to state what I understand to be the exact proposition contended for by the defendant, and, as I think, contended for rightly. It is this: If the drawer of a check pay it into a banker to the account of a third person, and the consideration as between the person to the credit of whose account the check has been paid and the drawer of the check wholly fails, so that as between those two parties the drawer would have a perfect answer to any action on the check, then the drawer may stop payment of, and has an answer to any action on, the check, as against the bankers who have received it, unless in the mean time they have in some way given some value for it; as by paying money, or giving credit or some other advantage, to the customer to whose account it has been paid in, or by altering their own position in some way in consequence of having received the check, and on the faith of its being paid.

Now, it is too late to dispute that a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value. But it seems equally clear that this is an exception to general rules, an extraordinary protection given to such a holder on grounds of commercial policy only, and in order to favor the unrestricted use as currency of negotiable instruments. "It is," says Chancellor Kent, in the well-known case of *Bay v. Coddington*, "the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it." Mr. Justice Willes uses language very much the same in *Whistler v. Forster*: "The general rule of law is undoubted, that no one can transfer a better title than he himself possesses: *Nemo dat quod non habet*. To this there are some exceptions,

one of which arises out of the law-merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money; and, if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud, which would have rendered it unavailable in the hands of a previous holder." It would be wasting time to quote other authorities to the same effect: these are sufficient to show the grounds of sense and substance on which the law as to bills is supported. Nor, if it be necessary to have recourse to it, is the technical element of consideration wanting between the transferrer and the transferee of such an instrument. Whether the true view be that adopted by Sir John Byles (Byles on Bills, 10th ed. p. 39), that a bill or note payable at a future day suspends until its maturity the remedy for the antecedent debt; or that adopted by my brother Lush, from the judgment of the Court of Common Pleas in *Belshaw v. Bush*,¹ that it is a conditional payment of the debt, the debt reviving if the security is not realized,—in either view, there is consideration which may enter into, but is not the whole reason for, the protection given to the *bona fide* holder of such an instrument. The whole reason certainly does not apply to the case of a check; and the true question, with deference, appears to me to be whether, apart from the reasons which protect the *bona fide* holder of bills payable at a future day, which do not apply, there are any reasons or authorities which do apply to protect the *bona fide* holders of checks given under such circumstances as the check was given in this case.

As to authority, no case has been cited in which this point has been decided; yet it is certain that a case would have been cited, if it could be found. There is, indeed, a *dictum* of the Lord Chief Justice of the Queen's Bench, in *Watson v. Russell*,² to the effect that there is no difference between a bill and a check in the hands of a holder for value. But that *dictum* must be taken with the facts of that case, in which neither was the plaintiff a banker, nor was the consideration for the check an antecedent debt. No authority, as I have said, has been cited on which the point has been decided. Yet it surely needs one. The doctrine as to bills of exchange has been established after many disputes and much resistance: is it likely that in the case of checks no one who has been defrauded has ever resisted payment until now, but that every one has so felt the sense and reason of the rule contended for that it has been acquiesced in without a struggle? I think not; and I cannot find, on the best information I have been able to get, that the general understanding is what my brother Lush believes it to be.

¹ 11 C. B. 191.

² 3 B. & S. 34.

On the contrary, my impression is that the opinions of men of business are much divided on this subject; and that, if the court were to decide, as I think it ought, in favor of the defendant, the consequences to mercantile transactions would be by no means so serious as it has been too much taken for granted they would be. And, even if the matter of fact were clearer than it is, the understanding of mercantile men, though on such a subject entitled to deference, cannot and ought not to determine the question. Apart, then, from authority, which is wanting, how stands the thing in sense? I take a case of gross and direct fraud; for to such a case the argument, if it is good for any thing, must extend. A man is cheated out of a check for a large sum in favor of A.: A., who has cheated him, pays the check into his bankers, between whom and himself there have been large dealings, greatly to the bankers' advantage. At the moment when the check is paid in, A. is overdrawn; and thereupon, nothing more happening, the banker claims the value of the check against the cheated drawer, and denies the drawer's right to protect himself against the fraud of A. by stopping his check, simply and solely on the ground that the fraudulent man has been allowed by the banker to overdraw his account. I can see no reason or justice in this. If either the drawer or the banker must suffer to the extent of the value of the check, it seems to me much more reasonable and just that he should suffer who, with his eyes open, and to a person he knows, has gone on making advances, than he who has been directly defrauded, often in a first and single transaction, and also has often no means whatever of protecting himself against fraud. To me the rule seems hard in the case of money, but it is well settled. It seems hard in the case of bills due at a future date, which are said to be like money, and to stand upon the same foot; but that is also well settled. But checks are not money. No rule, as far as I can find, either of practice or of law, is settled with regard to them; and I am not willing to make a rule as to checks in favor of bankers which is not just in itself, and which is not defensible, at least upon the grounds on which the rules as to money and as to bills are defended.

It is said that the distinction between a bill and a check is a refined one; but it is to be observed, first, that where a line is drawn, cases close to this line, but on different sides of it, must needs be separated by a distinction which is refined; and, next, that we are here dealing with an exception to a general rule: and the burden of proof and stress of argument seem to me to lie rather on those who say, than on those who deny, that it is within the exception. It is for those who assert it to make it out; and the absence of direct affirmative authority in such a case is, to my mind, strong authority in the negative.

It has, however, been argued that the legal element of consideration is not entirely absent where a check is given, because it is payable immediately; and my brother Lush has put together, from Comyns's Digest, Action on the Case, Assumpsit, B. 1-15, a definition or description of consideration, to the accuracy of which I entirely assent. It is sought to draw from this definition the conclusion that the practice, by no means uniform or binding, of allowing twenty-four hours to elapse between the drawing or receipt and presentment of a check constitutes a new consideration as between the drawer and the payee. I cannot assent to this view. It assumes the substantial identity of a check with other instruments from which it differs. "A check," says Mr. Justice Story, Promissory Notes, 6th ed. p. 674, "is an absolute appropriation of so much money in the hands of a banker to the holder of the check; and there it ought to remain until called for. In truth," he goes on, "a check is an instrument *sui generis*, and is construed exactly as the parties intend it. It is supposed to be drawn upon funds in the hands of the banker as banker; and it appropriates the amount to the holder of the check." To the same effect is the judgment of Sir John Byles in *Keene v. Beard*: "A check is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person." And, in commenting on *De la Chaumette v. Bank of England*,¹ the same learned person draws the very distinction which is insisted upon here in the defendant's favor: "It would seem to follow," says he (Byles on Bills, 10th ed. p. 39), "as a general rule, that whenever a bill or note payable on demand is remitted to a creditor in liquidation of an existing debt only, and no fresh credit is given or advances made by the creditor on the faith of the instrument, he may be treated by the parties liable on it as the agent of the debtor from whom he received it: a doctrine which, while it cannot injure the creditor (for if he cannot recover, still he is but where he was before he received the remittance), would no doubt tend to prevent gratuitous, fraudulent, or felonious holders of paper from obtaining its value by paying it away to their creditors; but it is conceived that in general a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value." And in a note to this passage he observes: "It is to be recollected that a *bill* or note payable at a future day suspends till its maturity the remedy for the antecedent debt. There may therefore, in this respect, be a difference between an instrument payable on demand and one payable at a future day."

There is, therefore, nothing to bind a banker not to present a check paid in till the next day. In practice, I believe it happens constantly

that they are presented at once. Although, therefore, there may be an expectation of forbearance for twenty-four hours upon the giving of the check, the giving of it is no consideration to forbear; and it is fallacious to confuse things in their nature different.

There are not, as we have seen, any cases directly upon checks; but there are some upon the subject of bank-notes, to which it may be proper to advert. In *Solomons v. Bank of England*, which is reported in a note to *Lowndes v. Anderson*,¹ the plaintiffs were London merchants in advance to foreign correspondents. A note had been fraudulently obtained, and had been stopped at the bank by the person defrauded. The plaintiffs were innocent of the fraud, and had received the note to be applied in diminution of an existing debt. There was evidence to connect the foreign correspondents with the fraud; and Lord Kenyon held at *Nisi Prius* that the King's Bench afterwards supported the ruling that the London merchants had given no consideration; that they were, therefore, mere agents to receive the amount of the note from the bank; that they could be in no better position than their principals; and, as Mr. Justice Buller expressed it *in banco*, "they must stand or fall by the title of their foreign correspondents." This case was decided in 1791; and it came under the consideration of the King's Bench in 1829, in the case of *De la Chaumette v. Bank of England*.² In that case, two bank-notes had been fraudulently obtained, and were remitted from abroad to the plaintiff, an English merchant, who was, at the time he received them, largely in advance to the foreign remitter. It was held by Lord Tenterden and the Court of King's Bench that the plaintiff could only recover on the title of the foreign sender. "It appeared," says Lord Tenterden, giving the judgment of the court, "that at the time when the note was remitted to the plaintiff the balance as between him and Odier & Co., the foreign senders, was £7,000 in favor of the plaintiff; but he did not, in consequence of having received the note, make any further advance or give any further credit to Odier & Co., than he would have done if the note had not been transmitted. Unless, therefore, we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co., and that, if he can recover at all, it must be upon their right." A Bank of England note is not a check, no doubt; but neither is a check an unmatured bill. To hold that the plaintiffs cannot recover in this case, except on Lizardi's title, and that they were his agents to receive the defendant's check, is not in conflict with any of the cases which have been decided on bills of exchange while it is, I think, in

¹ 13 East, 135.

² 9 B. & C. 298.

accordance with the principles of the two cases I have last mentioned, as well as with real justice.

I am not aware that these cases at all interfered with the negotiability of bank-notes; and I do not think that the negotiability of checks will be injured if this case were decided as I should wish to decide it.

There remains the smaller question, whether the special circumstance that a so-called "bill" was given up on receipt of the check formed of itself a sufficient consideration to entitle the plaintiffs to recover? I need say no more than that I think it did not. The so-called bill was not a bill: it was a mere memorandum, and inchoate; and its relinquishment was the giving up of nothing which can be called a consideration. For these reasons, I am of opinion that the judgment of the court below should be reversed. *Judgment affirmed.*¹

¹ This judgment was affirmed in the House of Lords, 1 App. Cas. 554, but upon the ground that the check was valid even in the hands of Lizardi. — Ed.

Watson v. Russell, 3 B. & S. 34, accords with the judgment of the Exchequer Chamber in the principal case.

In *Nugent v. Gifford*, 1 Atk. 463; *Whale v. Booth*, 4 T. R. 625, *n.*; *Doe v. Fallows*, 2 Cr. & J. 481, 483 (*semble*), it was held that assets of a testator, which the executor had wrongfully applied to the satisfaction of a debt due from him personally, could not be recovered from the creditor, who received them without notice of the executor's misconduct; and in *Mead v. Orrery*, 3 Atk. 235; *Hawkins v. Taylor*, 8 Ves. 209, a similar creditor acquired a valid title to property of the testator assigned to him by the executor as collateral security for the debt. See also *Hodgson v. Dand*, 2 Bro. C. C. 475. As to transfers by executors for their own debt, however, see 2 *Williams' Executors*, 7 ed. 987.

The transfer by a trustee of trust property, in discharge of a personal claim against himself, has been held to be a transfer for value. *Thorndike v. Hunt*, 3 DeG. & J. 563. But see *Case v. James*, 3 DeG., F. & J. 256, 264.

Similarly, the transfer of a bill of lading by an insolvent vendee, in consideration of his release from a valid contract to furnish other securities for the payment of advances, has been held to be a transfer for value which would defeat the vendor's right of stoppage *in transitu*. *Chartered Bank v. Henderson*, L. R. 5 P. C. 501. And in *Leask v. Scott*, 2 Q. B. D. 376, the Court of Appeal, declining to follow *Rodger v. The Comptoir D'Escompte*, L. R. 2 P. C. 393, held that the vendor's right of stoppage *in transitu* was gone, although the bill of lading was transferred by the insolvent vendee merely to cover an antecedent indebtedness. — Ed.

BAY v. CODDINGTON AND OTHERS.

IN THE COURT OF CHANCERY, NEW YORK, NOVEMBER 17, 1820,
AND JANUARY 8, 1821.

[Reported in 5 Johnson's Chancery Reports, 54.]

THE plaintiff, being owner of a vessel, employed Randolph & Savage, defendants, who were carpenters, to sell her on a credit, and take good notes in payment, and transmit the same to him, with an account of their charges, which he would pay. R. & S. sold the vessel for \$3,875, and on the 3d of June, 1819, received the notes of the purchasers, payable in two, three, and four months; some of them being made payable to and indorsed by P. Aymar & Co., and the others by J. R. Stewart. On the 12th of June, 1819, R. & S. delivered the notes so indorsed to the defendants, J. & C. Coddington, who were at that time, as they stated in their answer, under heavy responsibilities for R. & S., as indorsers of notes for their accommodation, payable at different times, but all subsequent to the 12th of June, 1819, and which they were afterwards obliged to take up as they fell due, amounting to above \$17,000. The answers admitted that R. & S. had stopped payment, when the notes so held by them were to be delivered to J. & C. Coddington.

The defendants, J. & C. Coddington, denied all knowledge of the manner in which the notes had come to the hands of R. & S., and alleged that they believed that they were the *bona fide* and exclusive property of R. & S.; that they received these notes with others, as a guarantee and indemnity, as far as they would avail, for their responsibilities, and three days after disposed of some of the notes for cash, and did not know until several days afterwards that the notes belonged to the plaintiffs, as stated in the bill. They admitted that, when they so received the notes, R. & S. were not, in a strict legal sense, indebted to them, but that they were under large gratuitous responsibilities for them.

November 17, 1820. No proofs were taken, and the cause came on to be heard on the pleadings only.

S. Jones, for the plaintiff, contended: 1. That the notes were not negotiated by R. & S. to J. & C. Coddington, in the usual course of trade, nor by the authority of the plaintiff, nor for any consideration given, nor for any responsibility incurred on the credit of the notes; and the defendants, C. & C., could not, therefore, rightfully hold against the plaintiff, the true owner of them. Willes' Rep. 400; 1 Salk. 160; 3 Maule & Selw. 562; Cowper, 571.

2. That R. & S. having no property in the notes, nor any authority to use them, delivered them, after their insolvency was known, to C. & C. as security for responsibilities, for which they had not then become charged; and the notes could not therefore be held against the owner of them.

3. That the notes were held by C. & C. merely as trustees for R. & S.

4. That as C. & C., under the circumstances of the case, could acquire no interest in the notes, as against the true owner, they ought to account for them to him, with interest.

Wells, contra, put the case not on the ground of a factor pledging the goods of his principal, but on the ground that the notes, being negotiable paper, might be pledged by a *bona fide* holder, to secure an antecedent debt. The property and possession of negotiable bills or notes were inseparable. They might be transferred even by a person who had found or stolen them. Pledging the notes for an antecedent debt or existing responsibility was a valid consideration for the transfer, if a consideration was required. 3 Burr. 1516; 1 Burr. 452; 1 Boss. & Pull. 648; 5 Boss. & Pull. 170; 1 Boss. & Pull. 539; 13 Mass. 105; 15 Mass. 389. If the defendants, C. & C., had not relied on these notes, taken without any knowledge or suspicion that R. & S. were not the true and *bona fide* owners of them, they might have had other security.

Jan. 8, 1821. The cause stood over for consideration until this day.

THE CHANCELLOR. It is admitted that Randolph & Savage held the notes belonging to the plaintiff, which they transferred to the defendants J. & C. Coddington, on the 12th of June, 1819, as agents or trustees for the plaintiff, and that they had no authority to pass them away. It was a gross and fraudulent abuse of trust, on the part of R. & S. The only question now is whether J. & C. C. are entitled, under the circumstances disclosed, to hold the notes, and retain the amount of them as against the plaintiff.

Negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But the defendants, J. & C. C., have not entitled themselves to the protection of holders of that description. The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash or property advanced, debt created or responsibility incurred, on the strength and credit of the notes. They were received from R. & S. after they had stopped payment and had become insolvent within

the knowledge of J. & C. C., and were seized upon by the Coddingtons, as *tabula in naufragio*, to secure themselves against contingent engagements previously made for R. & S. and on which they had not then become chargeable. There is no case that entitles such a holder to the paper, in opposition to the title of the true owner. They were not holders for a valuable consideration within the meaning or within the policy of the law.

In *Miller v. Race*, a bank-note was stolen and came to the hands of the plaintiff, and he was held entitled to it. But the Court of King's Bench considered bank-notes as cash, which passed as money in the way of business; and the holder, in that case, came by the note for a full and valuable consideration, by giving money in exchange for it, in the usual course of his business, and without notice of the robbery, and on those considerations he was entitled to the amount of the note. So, in *Grant v. Vaughan*, a bill of exchange payable to bearer was lost, and the finder paid it to a grocer, for teas, and took the change. There the court laid stress on the facts that the holder came by the bill *bona fide*, and in the course of trade, and for a full and fair consideration, and that though he and the real owner were equally innocent, yet he was to be preferred, for the sake of commerce and confidence in negotiable paper. Again, in *Peacock v. Rhodes*, a bill of exchange, with a blank indorsement, was stolen, and negotiated to a person who took it in the way of his trade, for cloth sold and cash for the balance; and he was held entitled to hold it. Lord Mansfield placed reliance on the circumstance that it was received in the course of trade. It was "by reason of the course of trade, which creates a property in the assignee or bearer," that Holt, C. J. (1 Salk. 126, anon.), held that the owner of a bank-bill which was lost and transferred by the finder to C., for a valuable consideration, could not maintain an action against C. It will not be necessary to go further in support of the principle which uniformly pervades the cases upon this point; and I shall conclude with the case of *Collins v. Martin*, in which it was decided that if bills of exchange, indorsed in blank, be deposited with a banker, to be received when due, and the banker raises money on them by pledging them to C., and then becomes bankrupt, C. could not be sued by the real owner, as he took them innocently, without knowledge of the previous circumstances. But it is to be observed that C. there advanced money to the banker, on the credit of the bills, and, as Eyre, C. J., observed in that case, "if it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and affected by all that will affect him."

In short, I have not been able to discover a case in which the

holder of negotiable paper, fraudulently transferred to him, was deemed to have as good a title, in law or equity, as the true owner, unless he received it not only without notice, but in the course of business, and for a fair and valuable consideration given or allowed on his part, on the strength of that identical paper. It is the credit given to the paper, and the consideration *bona fide* paid on receiving it, that entitles the holder, on grounds of commercial policy, to such extraordinary protection, even in cases of the most palpable fraud. It is an exception to the general rule of law, and ought not to be carried beyond the necessity that created it.

I shall accordingly declare that the defendants, J. & C. Coddington, are not entitled to the notes or the proceeds thereof, as against the plaintiff, who was the lawful owner of them when they were transferred to those defendants, inasmuch as they did not receive the notes in the course of business, nor in payment, in whole or in part, of any then existing debt, nor for cash or property advanced, or debt created or responsibility incurred on the credit of the notes. And I shall direct that it be referred to a master to compute the amount of the said notes, with interest thereon, from the times they were respectively payable, to the time of making the report; and that all the defendants in the amended bill, or some or one of them, pay to the plaintiff the sum that shall be reported as the amount of the said notes, with interest, as aforesaid, within thirty days after the master shall have made and filed his report, and notice thereof, and of this decree, or that the plaintiff may have execution therefor, against all or either of the said defendants, according to the course and practice of the court.

And it is further ordered that the defendants R. & S. pay to the plaintiff his entire costs of this suit, to be taxed, including the costs of the original bill, and that the plaintiff give credit upon the costs so to be taxed the charges and commissions due from him to the said defendants, R. & S., upon the sale of the vessel in the pleadings mentioned, and amounting to ninety-six dollars and eighty-seven cents; and that he have execution for the balance of costs, after such deduction, against them, the said R. & S., according to the course and practice of the court. And it is further ordered that no costs be taxed or allowed to the plaintiff, or to the defendants J. & C. C., as against each other.

*Decree accordingly.*¹

¹ Affirmed in *Coddington v. Bay*, 20 Johns. 637.

Mobile Bank v. Hall, 6 Ala. 639; *Andrews v. McCoy*, 8 Ala. 920; *Brooks v. Whitson*, 15 Miss. 513; *N. Y. Co. v. DeWolf*, 3 Bosw. 86, *accord*.

Grant v. Kidwell, 30 Mo. 455, *contra*. — Ed.

FRANCIA AND OTHERS v. JOSEPH AND OTHERS.

IN CHANCERY, BEFORE WILLIAM T. McCOUN, V. C., NEW YORK,
FEBRUARY 19, 1838.

[*Reported in 3 Edwards, Chancery, 182.*]

BILL to recover the possession of a promissory note for seventeen hundred and eighty-three dollars and sixty-two cents, made by John Mel & Co. in favor of the complainants, and which, as the bill alleged, the complainants had placed in the hands of one Walter M. Oddie as their agent and broker, to get discounted. Also the bill showed that Oddie, being indebted to the defendants, Joseph L. Joseph & Co., in about the sum of two thousand dollars, delivered the said promissory note to the latter, as collateral security for the payment of the money so due by him to them. And there was a charge that the defendants never had paid or advanced any moneys on account of it. Prayer, that the promissory note should be given up, or, if negotiated or moneys received thereon, then that the amount might be made good to the complainants.

The defendants, in their answer, set forth that Oddie received of them certain notes of the bank of the United States, and promised to give his check for them to the amount of two thousand dollars; that the check which he gave was dishonored; and, on pressing him for payment, he gave them three several promissory notes, one of which was the note in question, as security, upon the understanding that they should forbear and not urge immediate payment; that, when they accepted of this proposition, the said Oddie indorsed the said promissory note in blank (with the other notes), and delivered them to these defendants, at which time they gave up a promissory note made by Silas E. Burrowes that Oddie had deposited with them; that they took them in good faith and without any knowledge, suspicion, or notice whatever of the complainants' having any right, claim, or interest whatever in this particular note or in any part of it, and the first knowledge they had was from the bill. They insisted that the complainants were not entitled to the aid of the court to extricate them from any disappointments which they might have brought upon themselves by reason of having substituted the said Oddie in their place, and furnished him with negotiable paper to pass off as his property upon third persons having no knowledge or suspicion of the latent interest of the complainants. They admitted that they had not paid or advanced to Oddie or to any other person for him any money what-

ever on account of the said promissory note. It appeared that the complainants had taken from Oddie a judgment by confession for his general indebtedness to them; but how far the amount of this identical note was embraced did not appear.

The cause came up on pleadings and proofs.

Mr. Tucker, for the complainants.

Mr. Cutting, for the defendants.

THE VICE-CHANCELLOR. By delivering the note of Mel & Co. to Oddie, the complainants did not part with the right of property in the note. It was still their note in Oddie's hands, until he parted with it for the purpose and in the way for which it was intrusted to him; namely, that of procuring it to be discounted for the complainants' use. Any other disposition or appropriation which Oddie might make of the note was a breach of trust on his part and a fraud on the complainants.

The proofs very clearly show that the note was delivered to Oddie for the specific purpose of procuring it to be discounted and of bringing the money to the complainants; and he had no right or authority, therefore, to appropriate it to himself or to pledge or hypothecate it for his own debt or purposes. It satisfactorily appears also that Oddie did hypothecate it with the defendants as collateral security for a pre-existing debt of two thousand dollars, which he owed to them. This was the only consideration on which the transfer and delivery of the note to the defendants took place. The latter made no fresh advances, nor did they part with any goods or other thing of value on the strength and credit of the note at the time of receiving it. Hence, they are not *bona fide* holders of this note, as if received in the course of trade or business for valuable consideration within the rule established in *Bay v. Coddington*, and followed in subsequent cases. *Wardell v. Howell*,¹ *Rosa v. Brotherson*,² and *Smith v. Van Loan*.³ True, the defendants say they granted forbearance or time to Oddie for the payment of the two thousand dollars, and were diverted from the immediate pursuit of their remedy against him, which they would have taken if they had not got hold of this note, or if they had received notice from the complainants that the note belonged to them. But this is not enough to give them a right to hold it. In *Wardell v. Howell*, it was expressly held that such circumstances did not constitute that valuable consideration which the policy of the law requires, in order to give the holder a title against him who has been defrauded out of the bill or note. So I think the circumstance of their returning to Oddie the Burrowes note is not enough. It was not paying a pres-

¹ 9 Wend. 170.

² 10 Wend. 85.

³ 16 Wend. 659.

ent value as a consideration for the note of Mel & Co. They gave up the one note because they deemed the other two which they received sufficient security for their debt.

Again, the taking a judgment by confession against Oddie in favor of the complainants at the time of his failure is relied on. But it does not appear that the amount of the note in question was included in the judgment, or that the complainants have thereby obtained any satisfaction for it. This objection, therefore, is of no avail.

Decree, that the defendants deliver up the note, with costs to the complainants to be taxed.¹

BANK OF SALINA v. BABCOCK AND OTHERS.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER TERM, 1839.

[Reported in 21 Wendell, 499.]

THIS was an action of assumpsit, tried at the Onondaga circuit in April, 1838, before the Hon. Daniel Moseley, one of the circuit judges.

The suit was brought against the maker and indorsers of a promissory note for \$1,500, at ninety days, dated 7th March, 1837, drawn by H. S. Gilbert, payable to L. Babcock, and indorsed by the latter and two mercantile firms, viz. Trowbridge & Grant and J. & H. Paddock. The note was discounted by the Bank of Salina, on the 15th March, 1837, and the proceeds placed to the credit of Trowbridge & Grant, on the books of the bank, with whom that firm had extensive dealings. On the next day, three notes drawn by Trowbridge & Grant, amounting together to upwards of \$2,000, which were overdue and laid in the bank under protest, were charged to the account of Trowbridge & Grant, and the notes cancelled; upon two of which, amounting to \$1,420, there was a responsible indorser. It was proved that the course of business at the Bank of Salina with such of their customers as had large dealings with the bank and resided at a distance, as was the case with Trowbridge & Grant, was to discount notes from time to time as they were received, and to credit the proceeds on the books, and, whenever a credit stood upon the books sufficient to pay such notes as had come to maturity, to charge the notes, cancel them, and

¹ Wardell v. Howell, 9 Wend. 170, *accord*.

Traders' Bank v. Bradner, 43 Barb. 379; Lewis v. Rogers, 34 N. Y. Sup'r. Ct. 64; Cary v. White, 52 N. Y. 138 (*semble*), *contra*. — ED.

send them home. On the part of the maker and payee of the note, it was proved that there had been a misappropriation of the note; that it had been made and intended by them that it should have been discounted for the benefit of the payee; and they insisted that the Bank of Salina, not having made any advances upon or given any actual value for the note, but having received it and appropriated it to the payment of antecedent debts, were not entitled to recover against the maker and payee. The judge among other things charged the jury that the acceptance of the note in question by the plaintiffs would not discharge the parties to the previous notes from their liability, and the jury accordingly found a verdict for the defendants. The plaintiffs ask for a new trial.

J. A. Spencer, for the plaintiffs.

W. Duer, for the defendants.

BY THE COURT, NELSON, C. J. There is no question in the case but that the plaintiffs received and discounted the note in good faith, and the only pretence of objection to the recovery was that no value had been given, and hence the defendant Babcock should be at liberty to set up the diversion of the paper. This seems to have been the view of the learned judge at the circuit, though the charge is somewhat obscure. The answer to the objection, however, is that the proceeds of the note were placed to the credit of Trowbridge & Grant, for whom it was discounted; and were drawn out,—not, I admit, by checking for the money, but by the cancellation of securities held by the plaintiffs, which was the same thing in legal effect.

The court ought not to speculate about the probability of reviving these cancelled securities, in case the paper upon the strength of which they were cancelled should turn out to be unavailable; much less ought we to go into a calculation of the chances of revival as the ground of defeating the substituted security. It is enough that the plaintiffs, in good faith, charged over and cancelled them according to usage, and held them merely to be sent home. This is parting with value in the strictest sense of the term. The plaintiffs had a right to give up the old securities upon the faith of the new paper, and they have done an act that is equivalent, and so intended. What if the old debt might still remain, which seems to have been the idea of the judge at the circuit? The securities which were held beyond the responsibility of the debtor himself were destroyed. Regarding the usage of the bank in keeping its accounts with its customers, as detailed by the cashier, we may safely say that any alteration of the state of them to the prejudice of the institution, by reason of the discount of new paper, should be deemed a parting with value therefor, within the meaning of the rule of law. It was urged on the argument that there was no evidence

that these securities were cancelled in consequence of the receipt of the note in question ; but this is most obvious, as well from the course of dealing as the testimony of the cashier.

*New trial granted.*¹

BANK OF SANDUSKY v. SCOVILLE, BARTON, & MOONEY.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK,
MAY, 1840.

[Reported in 24 *Wendell*, 115.]

THIS was an action of assumpsit, tried at the Erie circuit in January, 1839, before the Hon. Nathan Dayton, one of the circuit judges.

The action was on a note for \$500, dated May 11, 1837, made by the defendant Scoville, payable sixty days after date, at the Bank of Buffalo, to the order of the defendant Barton, and indorsed by him and the defendant Mooney. The defence was usury. It was an accommodation note, which had been discounted at an usurious rate of interest by Henry D. Ward, a broker in Buffalo, and by him negotiated to the plaintiffs. Ward, in his deposition, testified that he passed the note to and it was discounted by the plaintiffs, in June, 1837, to extinguish a debt due by the witness to the plaintiffs ; and, again, he said the note was discounted by the plaintiffs for his benefit, and the avails went so far to discharge his liability to them. The plaintiffs had no knowledge of the usury. The judge ruled that the plaintiffs were *bona fide* holders, and entitled to recover. Exception. Verdict for plaintiffs. Defendants move for a new trial.

S. Stevens, for defendants.

A. Taber, for plaintiffs.

BY THE COURT, BRONSON, J. The note was transferred before the usury act of 1837 took effect : the plaintiffs received it in good faith, without any notice of the usury, and the only question is whether they paid a valuable consideration. 1 R. S. 772, § 5. I think they did. It is not the case of a note received in security for a precedent debt, without parting with any thing at the time. The note was discounted

¹ *Outhwite v. Porter*, 13 Mich. 533 ; *Mohawk Bank v. Corey*, 1 Hill, 513 ; *Ayrault v. McQueen*, 32 Barb. 305 ; *Essex Co. Bank v. Russell*, 29 N. Y. 673 ; *Keyes v. Wood*, 21 Vt. 331, *accord*.

The surrender of confessedly worthless securities will not give one the rights of a purchaser for value. *Stewart v. Small*, 2 Barb. 559. A *dictum* to the contrary in *Park Bank v. Watson*, 42 N. Y. 490, may be regarded as overruled. *Stevens v. Corn Bank*, 3 Hun, 147, 150 ; *Huff v. Wagner*, 63 Barb. 215, 233. — ED.

by the plaintiffs for the benefit of Ward, to extinguish his debt; and the avails went to discharge his liability to the bank. I cannot understand this language as meaning less than that the proceeds of the note were actually applied to the use of Ward. It is the same thing, substantially, as though Ward had first received the money, and then paid it over to the plaintiffs, or, indeed, to any other creditor. If Ward's liability was discharged, his debt extinguished, it is impossible to deny that the plaintiffs, in effect, parted with their money, and that Ward received it. In the *Bank of Salina v. Babcock* and others, the old notes were charged over and cancelled by the bank; and, although not actually given up, we held that the bank was a *bona fide* holder for value of the new note which had been discounted to take up the old ones. The principle of that case is, I think, decisive in favor of the plaintiffs.

We were referred by the counsel for the defendants to the case of the *Ypsilanti Bank v. Martin* and others, decided on the argument at July term, 1839. I have looked into the papers in that case, and it does not appear that the bank had parted with the proceeds of the note, by either paying over the money to Stevens & Co. or applying it in satisfaction of their debt. We thought the plaintiffs had not made out that they had in any way paid value for the note, and on that ground the report of the referee was set aside.

*New trial denied.*¹

¹ In *Bank of St. Albans v. Gilliland*, 23 Wend. 311, a note was transferred to plaintiff, without recourse, in satisfaction of a debt. Nelson, C. J., who delivered the opinion of the court, said, p. 313: "We have frequently held that receiving a note for a *precedent debt* is not receiving it *for value* within mercantile usage . . . ; but here was something more. The note was taken in *satisfaction of the indebtedness, without recourse, and the debt discharged*, importing that it was received at the risk of the holder, and that, unless available in his hands, he loses the demand. He has therefore trusted to the credit of the papers as effectually as if he had parted with the securities of third persons at the time, having discharged the personal responsibility of the original debtors." To the same effect are *Gould v. Segee*, 5 Duer, 260, where the note was transferred without indorsement in satisfaction of the debt; and *Thorn-dike v. Hunt*, 3 DeG. & J. 563; *Chartered Bank v. Henderson*, L. R. 5 P. C. 501; *Love v. Taylor*, 26 Miss. 567; *Soule v. Shotwell*, 52 Miss. 236; *Power v. Freeman*, 2 Lans. 127; *Paddon v. Taylor*, 44 N. Y. 371; *Justh v. Nat. Bank*, 56 N. Y. 478, (*semble*), where property other than negotiable paper was transferred in extinguishment of an antecedent claim. In *White v. Springfield Bank*, 3 Sandf. 222; *N. Y. Marbled Works v. Smith*, 4 Duer, 362, the holder of a note was held to be a purchaser for value, although the note was *indorsed* to him in satisfaction of an antecedent debt. See also *Farrington v. Frankfort Bank*, 24 Barb. 554; 31 Barb. 183, s. c. — ED.

WILLIAMS, EXECUTRIX, &C., v. SMITH AND OTHERS.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1842.

[Reported in 2 Hill, 301.]

ASSUMPSIT, tried at the Albany circuit in April, 1841, before Cushman, C. J. The action was against the defendants as makers and indorsers of a promissory note of \$4,000, made by Smith, Green, & Co., payable to the order of Daniel K. Green, and indorsed by the latter and A. Preston. The note was created for the purpose of taking up another note of the same amount, running at the Oneida Bank. Both notes were against the same parties, except Preston, whose name was not upon the elder note; and who indorsed the note sued upon for the accommodation of the other parties, with the understanding that, if it was not used to take up the other note, it should be destroyed. It was delivered to Norton, one of the makers, to hand to the Oneida Bank; but he let one Keeler have it to raise money upon, and Keeler assigned it, with various other choses in action and possession, to the plaintiff's testator, as security to him against indorsements to be by him made for Keeler, not exceeding \$10,000. The indorsements were made; and there had been obtained out of the other property assigned to the testator an indemnity for all his liabilities, except about \$2,400. It not appearing that the testator had notice of the purpose for which the note was intended, the circuit judge allowed the plaintiff to recover against all the defendants, Preston included, for the whole amount of the note. A new trial was now moved for on a bill of exceptions.

H. Sheldon and *M. T. Reynolds* insisted, in behalf of the defendant Preston, that the testator could not be deemed a *bona fide* holder, inasmuch as he took the note, not by way of purchase on an advance made, but only as collateral security. They further insisted that, at all events, the plaintiff was entitled to recover only what remained due on the principal demand; and that the circuit judge erred in allowing a recovery for the full amount of the note.

O. Allen and *S. Stevens*, for the plaintiff.

PER CURIAM. The case is within the principle which applies to an advance upon a purchase;¹ and, the testator having had no notice, Preston, though a mere accommodation indorser, could not defend on the ground of the misapplication of the note.

¹ *Wells v. Chapman*, 81 Ill. 137; *Stotts v. Byers*, 17 Iowa, 303; *Humphrey v. Vertner*, Freem. Ch. (Miss.) 251; *Freeman v. Deming*, 3 Sandf. Ch. 327; *Mickles v. Colvin*, 4 Barb. 304; *Bacon v. Holloway*, 2 E. D. Sm. 159; *Adams v. Soule*, 33 Vt. 538, *accord.* — Ed.

But inasmuch as the testator took the note as collateral security, the plaintiff could recover no more than the \$2,400, the amount remaining due on the principal demand; and on this ground there must be a new trial. *New trial granted.*¹

JOHN SWIFT v. GEORGE W. TYSON.

IN THE SUPREME COURT, UNITED STATES, JANUARY TERM, 1842.

[Reported in 14 Curtis, 166; 16 Peters, 1.]

THE case is stated in the opinion of the court.

Fessenden, for the plaintiff.

Dana, contra.

STORY, J., delivered the opinion of the court.

This cause comes before us from the Circuit Court of the southern district of New York, upon a certificate of division of the judges of that court.

The action was brought by the plaintiff, Swift, as indorsee, against the defendant, Tyson, as acceptor, upon a bill of exchange dated at Portland, Maine, on the 1st day of May, 1836, for the sum of \$1,540.30, payable six months after date and grace, drawn by one Nathaniel Norton and one Jarius S. Keith upon and accepted by Tyson, at the city of New York, in favor of the order of Nathaniel Norton, and by Norton indorsed to the plaintiff. The bill was dishonored at maturity.

At the trial, the acceptance and indorsement of the bill were admitted, and the plaintiff there rested his case. The defendant then introduced in evidence the answer of Swift to a bill of discovery, by which it appeared that Swift took the bill before it became due, in payment of a promissory note due to him by Norton and Keith; that he understood that the bill was accepted in part payment of some lands sold by Norton to a company in New York. Swift was a *bona fide* holder of the bill, not having any notice of any thing in the sale or title to the lands, or otherwise, impeaching the transaction, and with the full belief that the bill was justly due. The particular circumstances are fully set forth in the answer in the record; but it does not

¹ *Easter v. Minard*, 26 Ill. 494; *Saylor v. Daniels*, 37 Ill. 331; *Maitland v. Citizens' Bank*, 40 Md. 540; *Chicopee Bank v. Chapin*, 8 Met. 40; *Stoddard v. Kimball*, 4 Cush. 604; 6 Cush. 469, s. c.; *Roche v. Ladd*, 1 All. 436; *Drinkhouse v. Surette*, 1 All. 443, n.; *Grant v. Kidwell*, 30 Mo. 455; *Allaire v. Hartshorne*, 1 Zab. 665; *Atkinson v. Brooks*, 26 Vt. 569, accord.

See *Mayo v. Moore*, 28 Ill. 428. — Ed.

seem necessary further to state them. The defendant then offered to prove that the bill was accepted by the defendant as part consideration for the purchase of certain lands in the State of Maine, which Norton and Keith represented themselves to be the owners of, and also represented to be of great value, and contracted to convey a good title thereto; and that the representations were in every respect fraudulent and false, and Norton and Keith had no title to the lands, and that the same were of little or no value. The plaintiff objected to the admission of such testimony, or of any testimony, as against him, impeaching or showing a failure of the consideration on which the bill was accepted, under the facts admitted by the defendant, and those proved by him, by reading the answer of the plaintiff to the bill of discovery. The judges of the Circuit Court thereupon divided in opinion upon the following point or question of law: whether, under the facts last mentioned, the defendant was entitled to the same defence to the action as if the suit was between the original parties to the bill, that is to say, Norton, or Norton and Keith, and the defendant; and whether the evidence so offered was admissible as against the plaintiff in the action. And this is the question certified to us for our decision.

There is no doubt that a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there that the holder of any negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

In the present case, the plaintiff is a *bona fide* holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say under the circumstances of the present case; for, the acceptance having been made in New York, the argument on behalf of the defendant is that the con-

tract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.

In the first place, then, let us examine into the decisions of the courts of New York upon this subject. In the earliest case, *Warren v. Lynch*,¹ the Supreme Court of New York appear to have held that a pre-existing debt was a sufficient consideration to entitle a *bona fide* holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent, in *Bay v. Coddington*. Upon that occasion, he said that negotiable paper can be assigned or transferred by an agent or factor, or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration, without notice of the fraud. But he added that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming that a pre-existing debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries. 3 Kent Com. § 44, p. 81. The decision in the case of *Bay v. Coddington* was afterwards affirmed in the Court of Errors, and the general reasoning of the Chancellor was fully sustained. There were, indeed, peculiar circumstances in that case which the court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground, either because the receipt of the notes was under suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a pre-existing debt was a valuable consideration, sufficient to protect the holders, and others again insisting that a pre-existent debt was not sufficient. From that period, however, for a series of years, it seems

¹ 5 Johns. 239.

to have been held, by the Supreme Court of the State, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially *Rosa v. Brotherson*,¹ the *Ontario Bank v. Worthington*,² and *Payne v. Cutler*,³ are directly in point. But the more recent cases, the *Bank of Salina v. Babcock* and the *Bank of Sandusky v. Scoville*, have greatly shaken, if they have not entirely overthrown those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain that the Court of Errors have not pronounced any positive opinion upon it.

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local; that is to say, to the positive

¹ 10 Wend. 85.² 12 Wend. 598.³ 13 Wend. 605.

statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves; that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgment is to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*,¹ to be in a great measure not the law of a single country only, but of the commercial world. “Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.”

It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of or as security for a pre-existing debt is accord-

¹ 2 Burr. R. 882, 887.

ing to the known usual course of trade and business. And why upon principle should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor, driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuitry to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts.

This question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The cases of *Coolidge v. Payson* and *Townsley v. Sumrall*¹ are directly in point.

In England, the same doctrine has been uniformly acted upon. As long ago as the case of *Pillans and Rose v. Van Mierop and Hopkins*,² the very point was made and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a pre-existing debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion, Lord Mansfield, likening the case to that of a letter of credit, said that a letter of credit may be given for money already advanced, as well as for money to be advanced in future; and the whole

¹ 2 Pet. 170, 182.

² 3 Burr. 1664.

court held the plaintiff entitled to recover. From that period downward, there is not a single case to be found in England, in which it has ever been held by the court that a pre-existing debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental *dicta* have been sometimes relied on to establish the contrary, such as the *dictum* of Lord Chief Justice Abbott in *Smith v. De Witts* and *De la Chaumette v. the Bank of England*,¹ where, however, the decision turned upon very different considerations.

Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. "The want of consideration," says he, "*in toto* or in part, cannot be insisted on, if the plaintiff, or any intermediate party between him and the defendant, took the bill or note *bona fide* and upon a valid consideration." Bayley on Bills, pp. 499, 500, 5th London ed., 1830. It is observable that he here uses the words "valid consideration," obviously intending to make the distinction that it is not intended to apply solely to cases where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go further, and establish that a transfer as security for past and even for future responsibilities will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of *Bosanquet v. Dudman*,² it was held by Lord Ellenborough that, if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, *bona fide*, he is to be considered as holding for value; and it makes no difference, though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in *Ex parte Bloxham*,³ as equally applicable to past and to future acceptances. The subsequent cases of *Heywood v. Watson*,⁴ and *Bramah v. Roberts*,⁵ and *Percival v. Frampton*,⁶ are to the same effect. They directly establish that a *bona fide* holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions which our researches have enabled us to ascertain to have been made in the English courts upon this subject.

In the American courts, so far as we have been able to trace the decisions, the same doctrine seems generally, but not universally, to prevail. In *Brush v. Scribner*,⁷ the Supreme Court of Connecticut,

¹ 9 B. & C. 208.² 1 Stark. 1.³ 8 Ves. 531.⁴ 4 Bing. 496.⁵ 1 B. N. C. 469.⁶ 2 C., M. & R. 180.⁷ 11 Conn. 388.

after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a pre-existing debt was a valuable consideration, sufficient to convey a valid title to a *bona fide* holder against all the antecedent parties to a negotiable note. There is no reason to doubt that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial States, it may fairly be presumed that whatever constitutes a valid and valuable consideration, in other cases of contract, to support titles of the most solemn nature, is held *a fortiori* to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt that a *bona fide* holder, for a pre-existing debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

CATRON, J., said: Upon the point of difference between the judges below, I concur that the extinguishment of a debt, and the giving a post consideration, such as the record presents, will protect the purchaser and assignee of a negotiable note from the infirmity affecting the instrument before it was negotiated. But I am unwilling to sanction the introduction of a doctrine into the opinion of this court, aside from the case made by the record or argued by the counsel, assuming to maintain that a negotiable note or bill, pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the foot of him who purchases in the market for money, or takes the instrument in extinguishment of a previous debt. State courts of high authority on commercial questions have held otherwise; and that they will yield to a mere expression of opinion of this court, or change their course of decision in conformity to the recent English cases referred to in the principal opinion, is improbable; whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this court probably would, and I think ought to settle it. As such a result is not to be expected from the opinion in this cause, I am unwilling to embarrass myself with so much of it as treats of negotiable instruments taken as a pledge. I never heard this question spoken of as belonging to the case, until the principal opinion was presented last evening; and therefore I

am not prepared to give any opinion, even was it called for by the record.¹

¹ In accordance with the decision of the principal case, that the unauthorized transfer of a negotiable security in payment of an antecedent debt is a transfer for value, are the following cases: *Bank of Metropolis v. New England Bank*, 1 How. 234; 6 How. 212, s. c.; *Pugh v. Durfee*, 1 Blatch. 412; *Riley v. Anderson*, 2 McL. 589; *Barney v. Earle*, 13 Ala. 106; *Bertrand v. Barkman*, 13 Ark. 150 (*semble*); *Brush v. Scribner*, 11 Conn. 388; *Roberts v. Hall*, 37 Conn. 205 (*semble*); *Bush v. Peckard*, 3 Harringt. 385; *Townsend v. France*, 2 Houst. 441; *Bond v. Central Bank*, 2 Ga. 92; *Meadow v. Bird*, 22 Ga. 246; *Russell v. Hadduck*, 8 Ill. 233; *Conkling v. Vail*, 31 Ill. 166; *Foy v. Blackstone*, 31 Ill. 538; *McKnight v. Krisler*, 25 Ind. 336; *Alexander v. Springfield Bank*, 2 Met. (Ky.) 534; *May v. Quimby*, 3 Bush, 96; *Malard v. Aillet*, 6 La. An. 93 (*semble*); *Homes v. Smyth*, 16 Me. 177; *Norton v. Waite*, 20 Me. 175; *Cecil Bank v. Heald*, 25 Md. 562; *Blanchard v. Stevens*, 3 Cush. 162; *Ives v. Farmers' Bank*, 2 All. 236; *Le Breton v. Pierce*, 2 All. 14 (*semble*); *Thatcher v. Pray*, 113 Mass. 291; *Bostwick v. Dodge*, 1 Doug. (Mich.) 413; *Outhwite v. Porter*, 13 Mich. 533 (overruling *Ingerson v. Starkweather*, Walker, Ch. 346); *Stevenson v. Heyland*, 11 Minn. 198; *Clark v. Loker*, 11 Mo. 97; *Williams v. Little*, 11 N. H. 66 (*semble*); *Allaire v. Hartshorne*, 1 Zab. 665; *Armour v. McMichael*, 36 N. J. 92; *Reddick v. Jones*, 6 Ired. 107; *Carlisle v. Wishart*, 11 Oh. 172; *Roxborough v. Messick*, 6 Oh. St. 448; *Nat. Bank v. Crawford*, 2 Cincin. 125; *Baily v. Smith*, 14 Oh. St. 404; *Petrie v. Clark*, 11 S. & R. 377; *Struthers v. Kendall*, 41 Pa. 214; *Charleston Bank v. State Bank*, 13 Rich. 291; *Greneaux v. Wheeler*, 6 Tex. 515; *Dixon v. Dixon*, 31 Vt. 450; *Russell v. Splater*, 47 Vt. 273; *Stevens v. Campbell*, 13 Wis. 375; *Kellogg v. Fancher*, 23 Wis. 21; *Bange v. Flint*, 25 Wis. 544; *Knox v. Clifford*, 38 Wis. 651. To the same effect are *Ohio Bank v. Ledyard*, 8 Ala. 866; *Butler v. Haughwout*, 42 Ill. 18 (overruling the *dicta* in *Powell v. Jeffries*, 5 Ill. 387, and *Metropolitan Bank v. Godfrey*, 23 Ill. 579); *Doolittle v. Cook*, 75 Ill. 354; *Lee v. Kimball*, 45 Me. 172; *Wilson v. Powers*, 21 Minn. 187 (*semble*); *Schafeldt v. Pease*, 16 Wis. 659, in which cases the subject of the transfer was not negotiable paper.

But see *Sargent v. Sturm*, 23 Cal. 359; *Clark v. Flint*, 22 Pick. 231; *Haughout v. Murphy*, 6 C. E. Green, 118; *Pancoast v. Duval*, 11 C. E. Green, 445; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; *Zorn v. R. R.*, 5 S. Ca. n. s. 90; *Haynsworth v. Bischoff*, 6 S. Ca. n. s. 159, in which cases it was held, with a strange inconsistency, that the transfer of property other than negotiable paper, in payment of an antecedent debt, was not a transfer for value. See also *Ruth v. Ford*, 9 Kans. 17.

In accordance with the *dictum* of Story, J., that the unauthorized transfer of negotiable paper to secure an antecedent debt is a transfer for value, are the following cases: *Partridge v. Smith*, 2 Biss. 183; *Payne v. Bensley*, 8 Cal. 260; *Robinson v. Smith*, 14 Cal. 94; *Bridgport Bank v. Welch*, 29 Conn. 475 (*semble*); *Roberts v. Hall*, 37 Conn. 205 (*semble*); *Gibson v. Conner*, 3 Ga. 47; *Meadow v. Bird*, 22 Ga. 246 (*semble*); *Manning v. McClure*, 36 Ill. 490; *Valette v. Mason*, 1 Ind. 288 (*semble*); *Succession of Dolhonde*, 21 La. An. 3 (*semble*); *Harrison v. Pike*, 48 Miss. 46; *Maitland v. Citizens' Bank*, 40 Md. 540; *Washington Bank v. Lewis*, 22 Pick. 24; *Stoddard v. Kimball*, 4 Cush. 604; 6 Cush. 469, s. c.; *Fisher v. Fisher*, 98 Mass. 303; *Boatman's Inst. v. Holland*, 38 Mo. 49 (but see *Odell v. Gray*, 15 Mo. 337; *Goodman v. Simonds*, 19 Mo. 106); *Allaire v. Hartshorne*, 1 Zab. 665 (*semble*); *Armour v. McMichael*, 36 N. J. 92; *Bank of Republic v. Carrington*, 5 R. I. 515; *Cobb v. Doyle*, 7 R. I. 550; *Bank v. Chambers*, 11 Rich. 657; *Greneaux v. Wheeler*, 6 Tex. 515; *Atkinson v. Brooks*, 26 Vt. 569.

But see *Moore v. Godfrey*, 3 Story, 364 (*semble*); *Sargent v. Sturm*, 23 Cal. 359;

STALKER v. M'DONALD AND OTHERS.

IN THE COURT OF ERRORS, NEW YORK, DECEMBER, 1848.

[Reported in 6 Hill, 93.]

ON error from the Supreme Court. The defendants in error brought an action of trover against Stalker in the Superior Court of the city of New York, to recover the amount of two promissory notes alleged to have been converted by him : viz., one made by J. T. Storm & Co., dated August 5, 1839, payable in seven months ; and another made by Raynor & Pond, dated July 24, 1839, payable in six months. It appeared that the notes were originally delivered by the makers to Gillespie & Edwards, commission merchants in the city of New York, on a sale of goods made by them, in the course of their business, for the defendants in error ; and that the notes remained in the possession of Gillespie & Edwards until they transferred them to Stalker as hereinafter stated. The main question in the case was as to the effect of this transfer upon the rights of the defendants in error, there being no doubt that, previous thereto, they were the owners of the notes.

The transfer took place under the following circumstances : Stalker held a note against Gillespie & Edwards, not indorsed by any person, for \$2,044.08, falling due October 3, 1839, which had been deposited in a bank for collection. On the morning of that day, Gillespie, finding that his firm would not be able to meet the note, and fearing the consequences of suffering it to lie over in the bank, prevailed upon Stalker to withdraw it ; promising to pay the amount in a short time, and delivering to Stalker the notes in question as his security. When Stalker received the notes, he had every reason to suppose that Gillespie & Edwards owned them, and was not notified of the contrary until some time afterwards. The firm of Gillespie & Edwards failed, and

Chance v. McWhorter, 26 Ga. 315 ; Hill v. Gray, 6 C. L. J. 58 (overruling Work v. Brayton, 5 Ind. 396 ; Babcock v. Jordan, 24 Ind. 14) ; Clark v. Flint, 22 Pick. 281 ; Mingus v. Condit, 8 C. E. Green, 313 ; Wheeler v. Kirtland, 9 C. E. Green, 552 ; Poor v. Woodburn, 25 Vt. 234, in which cases it was also inconsistently held that the transfer of property other than negotiable paper to secure an antecedent debt was not a transfer for value. In Morse v. Godfrey, *supra*, Story, J., said, p. 389 : " But here the bank merely possessed itself of the property transferred, as auxiliary security for the old debts and liabilities. It has paid or given no new consideration upon the faith of it. It is, therefore, in truth no purchaser for value in the sense of the rule. . . . The case of Swift v. Tyson does not apply. In the first place, there the bill was taken in payment or discharge of a pre-existing debt. In the next place, it was a case arising upon negotiable paper, and who was to be deemed a *bona fide* holder thereof, to whom equities between other parties should not apply. Such a case is not necessarily governed by the same considerations as those applicable to purchasers of real or personal property, under the rule adopted by courts of equity for their protection." See also Glidden v. Hunt, 24 Pick. 221. — ED.

stopped payment in November, 1839, without having then or since accounted to the defendants in error for the proceeds of the goods forming the consideration of the notes. Gillespie testified that, intermediate the day when Stalker received the notes, and the failure of the firm of Gillespie & Edwards, the latter paid "one or more notes in bank, in the regular course of business," but how many, and to what amount, he was unable to tell. The notes in question were duly paid to Stalker at maturity. It was admitted that they had been demanded of him by the defendants in error, and that he refused to deliver them up.

The Superior Court charged the jury that, if the notes in question were the property of the defendants in error at the time of the transfer, and were not taken by Stalker upon any consideration parted with by him on the credit thereof, nor in payment of the note of Gillespie & Edwards, but as a mere pledge or collateral security for that note, then the defendants in error were entitled to recover; and the notes having been paid to Stalker at maturity, he was liable, if at all, for their nominal amount. The jury found a verdict against Stalker for the amount of the notes; and he, having excepted to the charge, brought error to the Supreme Court, where the judgment of the Superior Court was affirmed. He then brought error to this court. The case was argued here by

J. W. Gerard, for the plaintiff in error, and

D. Lord, Jr., for the defendants in error.

WALWORTH, CHANCELLOR. The object of this writ of error appears to be to induce this court to overrule its decision in the case of *Coddington v. Bay*, and to make our decision conform to the opinion of Mr. Justice Story in the recent case of *Swift v. Tyson*, decided by the Supreme Court of the United States. Upon questions arising under the Constitution and laws of the United States, and upon the construction of treaties, the decisions of that high tribunal are binding upon the State courts; and we are bound to conform our decisions to them. But, in questions of local law, and in the construction of the constitution and statutes of the State, the decisions of the highest court of judicature of the State are the evidence of what the law of the State is, and are to be followed in preference to those of any other State or country, or even of the United States. On a question of commercial law, however, it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several States and of the United States, but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive. I have therefore thought it my duty to re-examine the principles upon which

the decision of this court in *Coddington v. Bay* was founded, notwithstanding it was deliberately made, with the concurrence of at least one of the ablest judges who has ever adorned the bench of this State, and has been acquiesced in and followed by all the courts of the State for more than twenty years. And I have done it, not only out of respect to the decision actually made by the Supreme Court of the United States, in the case alluded to, but also because the opinion of the distinguished judge who pronounced its decision is of itself entitled to very great weight upon a question of commercial law; although what he said in that case respecting the transfer of a negotiable note as a mere security for the payment of an antecedent debt was not material to the decision of any question then before the court, and is therefore not to be taken as a part of its judgment in that case.

In *Coddington v. Bay*, this court did not, so far as I have been able to discover, run counter to any decision which had ever been made in this State or in England previous to that time. For the decision admits that the *bona fide* holder of negotiable paper, who has received it for a valuable consideration, without notice or reasonable ground to suspect a defect in the title of the person from whom it was taken in the usual course of business or trade, is entitled to full protection. But that where he has received it for an antecedent debt, either as a nominal payment or as a security for payment, without giving up any security for such debt which he previously had, or paying any money, or giving any new consideration, he is not a holder of the note for a valuable consideration, so as to give him any equitable right to detain it from its lawful owner. This principle, of protecting the *bona fide* holder of negotiable paper who has paid value for it, or who has relinquished some available security or valuable right on the credit thereof, is derived from the doctrines of the courts of equity in other cases where a purchaser has obtained the legal title without notice of the equitable right of a third person to the property. It has been uniformly held by the courts of equity in such cases that the purchaser who has obtained the legal title as a mere security or payment of a pre-existing debt, without parting with any thing of value, is not entitled to hold the property as against the prior equitable owner. And, if he has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*. This last principle was applied by one of the courts in England to the purchaser of a negotiable note, where the indorser of a note for £100, by his replication to the plea that it was indorsed to him without consideration, stated that it was indorsed to him for the consideration of £49; and he was only permitted to recover that amount against the defendant, from whom the

note had been obtained by the indorser without consideration. *Edwards v. Jones*.¹

It is somewhat singular that Mr. Justice Story should rely upon the opinion of Chancellor Kent in the case of *Bay v. Coddington* as evidence that the decision of this court sustaining his opinion, and affirming his decree in the same case, was a departure from the law of this State as previously settled. And the previous case of *Warren v. Lynch*² is not in conflict with the decision of this court; nor does it decide that a pre-existing debt is a sufficient consideration to protect the holder of a negotiable note which was not valid as between the original parties, against the equitable rights of the maker of the note, or against the rights of a previous owner. For the note in that case was given by Lynch for a valid and subsisting debt by [to?] the one to whom the debt originally belonged. Although it was taken in the name of another person, that person indorsed it in blank for the purpose of enabling the person to whom the debt belonged to negotiate it; and it was then transferred to the plaintiff, immediately for aught that appears, partly in payment or security of a pre-existing debt. The question then arose whether other creditors of the former owner of the note were not entitled to it, as being still the property of Rose, the original owner, or of Robertson, the indorser. What is said, therefore, as to the pre-existing debt is merely as to its being a sufficient consideration as between the plaintiff and Rose, from whom the plaintiff received the note. For if the transfer was valid as between them, the creditors of Rose, who were also endeavoring to obtain payment of a pre-existing debt merely, acquired no right to the money due on the note, by their subsequent suit in the nature of a foreign attachment in the State of Virginia. The case of *Birdseye v. Ray*,³ cited by the plaintiff's counsel on the argument, is a case of the same character. For both claimants in that case were endeavoring to obtain preference in payment of pre-existing debts. And the court decided that one of them, who had secured a specific lien upon the property by purchase from the owner, before the other creditor's execution was actually levied thereon, was entitled to hold it as against the execution, under the provision of the statute on that subject. In other words, that, as between creditors having equal equities, the debtor may lawfully prefer one to the other before an actual levy upon his property has been made.

There is no doubt that the cases of *Wardell v. Howell*,⁴ *Rosa v. Brotherson*,⁵ *Ontario Bank v. Worthington*,⁶ and *Payne v. Cutler*,⁷ in the Supreme Court of this State, and of *Francia v. Joseph*, before the

¹ 7 C. & P. 633.

² 5 John. 239.

³ 4 Hill, 159.

⁴ 9 Wend. 170.

⁵ 10 Wend. 85.

⁶ 12 Wend. 593.

⁷ 13 Wend. 605

Vice-Chancellor of the First Circuit, follow the decision of this court in the case of *Coddington v. Bay*. And they fully establish the principle that, to protect the holder of a negotiable security which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security, or nominally in payment of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security upon the faith of the paper thus improperly transferred to him without any fault on his part. I may also add that many other decisions to the same effect have been made in this State, in the different courts of law and equity, within the last twenty years; although most of them have not been reported.

It is supposed, however, by the learned judge who delivered the opinion of the Supreme Court of the United States in the case before alluded to, that this strong column of decisions, supported as it is by the decree of Chancellor Kent in the case of *Bay v. Coddington*, by the opinions of Chief Justice Spencer and Justices Woodworth and Platt in that case, and by every judge who has occupied a seat upon the bench of the Supreme Court since 1822, has been greatly shaken, if not entirely overturned, by two recent decisions of the Supreme Court. That the judges who made those two decisions do not themselves so understand them, however, is evidenced by the fact that they have given judgment in the case now under consideration, in conformity with the principle of the decisions which they are supposed to have overruled. And I have not been able to discover any thing in the opinions of the court, as reported in the cases of the *Bank of Salina v. Babcock* and the *Bank of Sandusky v. Scoville*, which necessarily conflicts with any previous decision of the Supreme Court upon the question now under consideration. In the first case, the note was discounted at the bank in the ordinary way. And the proceeds thereof were applied, by the authority of the persons for whom it was discounted, to pay up and cancel three other notes which were then due to the bank; upon two of which notes, amounting to nearly the whole of such proceeds, there was a responsible indorser. The court held that the effect of the transaction was the same as if the parties for whose benefit the note was discounted had actually received the money therefor, and had afterwards applied it to pay and discharge the notes then due; and that the indorser upon those notes was discharged from his liability. In the second case, the question arose under the usury law as contained in the Revised Statutes, which protects usurious notes in the hands of an indorsee or holder who shall have received the same in good faith and for a valuable consideration.¹

¹ 1 R. S. 172, § 5.

And the court considered the transaction the same as though the money had been actually paid to the person for whose benefit the usurious note was discounted, and he had then applied it in payment of the former note; so that the original indebtedness was extinguished, and the bank had no other remedy to recover their money except upon the note which was alleged to have been originally tainted with usury. The question in that case was whether the transaction was equivalent to an actual payment of the money for the usurious note, so as to make the bank a *bona fide* holder for a valuable consideration, and not whether giving the note for a pre-existing debt was a payment of value. Under a similar provision in the English statute, it has been decided that a negotiable note tainted with usury was invalid in the hands of an innocent party, who had merely taken it in payment of an antecedent debt. *Vallance v. Siddell*.¹ There is nothing in the reports of our own State, then, which is in conflict with the principle established in *Coddington v. Bay* in this court, that, to protect the holder of a negotiable security which has been passed to him in fraud of the rights of others, he must not only have taken it without notice, but must also have parted with something of actual value, upon the credit or value thereof; and that merely receiving it in security or payment of an antecedent debt, where by the settled rules of equity he would not be protected as a *bona fide* purchaser of property in other cases, is not sufficient.

Nor have I been able to find an actual decision in the English reports which is in conflict with the uniform course of decisions on this subject in this State. On the contrary, the English judges, when speaking on this subject, generally use the words "valuable consideration," in contradistinction from a mere valid or sufficient consideration as between indorser and indorsee. And that receiving the note in payment or security of a pre-existing debt merely is not understood as receiving it for a valuable consideration, in legal language, is evident from the decision of the case of *Vallance v. Siddell*, to which I have just referred.

I think the learned judge was under a mistake in supposing that this question arose in England, and was decided in the case of *Rose v. Van Mierop*.² That was a suit brought against defendants who had actually agreed with the plaintiffs to honor their drafts for money previously advanced by them to a third person. And the only question was whether the indebtedness of a third person was a sufficient consideration for the written promise of the defendants to accept the bills on his account. One of the earliest English cases upon the question which we are considering is the anonymous case before Chief Justice Holt

² 2 Nev. & P. 78.

² 3 Burr. 1663.

in 1698, where a bank-note payable to bearer was lost, and the finder passed it for a valuable consideration. In an action of trover brought by the loser against the person to whom it was thus passed, his lordship decided that the action did not lie against the defendant, because he had the note for a valuable consideration. The next in order of time was the case of *The Ex'rs of Devallar v. Herring*,¹ in 1727, where an annuity ticket was lost or stolen, and, after passing through several hands, came to Herring, the defendant, who purchased it for a valuable consideration. And it was decided that he was entitled to it, upon the ground that it had come to his hands *bona fide*, and for a valuable consideration. In *Haly v. Lane*,² which came before Lord Hardwicke in 1741, he thus lays down the rule: "Where there is a negotiable note, if it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a valuable consideration, yet, if the last indorsee gave money for it, it is a good note as to him, unless there should be some fraud or equity against him appearing in the case." The same principle of protecting the holder of a negotiable instrument, if received by him in the course of trade and for a valuable consideration, was recognized in the opinion of the Court of King's Bench, in 1753, while Chief Justice Lee presided in that court. *Maclish v. Elkins*.³ Then followed the case of *Miller v. Race*, before Lord Mansfield and his associates in 1758, where a bank-note was stolen from the mail, and came into the hands of the plaintiff, as the report states, for a full and valuable consideration, in the usual course and way of his business, and without any notice or knowledge that it had been taken from the mail; but, upon presenting it at the bank for payment, it was detained by the defendant, who was a clerk therein. And the decision of the court was in conformity with what is now understood to be the settled law both in that country and in this. But that Lord Mansfield understood the holder must have given a valuable consideration for the note to entitle him to protection is evident from what is said in his opinion in answer to a case cited by the defendant's counsel as having been decided by Lord Holt in 1700. In reference to that case, he says: "But Lord Chief Justice Holt could never say that an action would lie against a person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bona fide* paid to him, even though an action was brought by the true owner, because he had determined otherwise but two years before, and because bank-notes are not like lottery-tickets, but money." And the words "for a valuable consideration," as well as "*bona fide* paid to him," are italicized in the opinion of Lord Mansfield, to show that both are material and necessary to protect the holder of a note

¹ 9 Mod. 45.² 2 Atk. 181.³ Say. 73.

against the claim of a former owner thereof. This is also in accordance with what he actually did in the case of *Grant v. Vaughan*, which was tried before him six years afterwards. There a bill of exchange payable to bearer was lost, and was found by a stranger to the plaintiff, who gave it to the plaintiff upon the purchase of a parcel of teas, and received the change, after the plaintiff had made inquiry and ascertained that the drawer of the bill was a responsible person. And Lord Mansfield submitted it to the jury to decide : 1st, Whether the plaintiff came by the bill *bona fide* for a valuable consideration; and, 2d, Whether such bills payable to bearer were negotiable. The jury having found a verdict for the defendant, a new trial was granted,—not upon the ground that the first direction was wrong, but because his lordship had erred in submitting the question as to the negotiability of such a bill to the jury as a question of fact. And, in answering the objection raised by counsel to the negotiability of drafts payable to bearer, that it would be dangerous because upon a casual loss the finder might maintain an action upon them as bearer, he again says, “But the bearer must show it came to him *bona fide* and upon valuable consideration.” The next case was that of *Peacock v. Rhodes*, which came before the same court in 1781, while Lord Mansfield still presided there. In that case, a suit was brought against the drawers of a bill which had been indorsed in blank and was stolen, and had been passed to the plaintiff by a stranger professing to be the owner thereof, for its value, in payment of cloth and other articles in the way of the plaintiff's trade as a mercer, and partly for cash. And the case was decided in conformity with the previous decisions. But I do not find an intimation in this, or in either of the previous cases, that, if the person who received the note or bill had merely taken it in payment or security of an antecedent debt, without having parted with any thing of value on the credit or faith thereof, he would have been entitled to hold the note or bill against the former rightful owner. On the contrary, we may infer what Lord Mansfield's opinion would have been upon the question of applying it in payment of a precedent debt, from what he actually decided in 1777, in the case of *Buller v. Harrison*.¹ There, money had been paid to an agent under a misapprehension of facts, and had been passed by him to the credit of his principal, in satisfaction of a previous indebtedness, before he had any notice or suspicion that the money was not justly and equitably due to such principal. And his lordship decided that the agent must refund the money, and resort to his principal to recover what was due to him before the money was so applied; that, as no new credit was given, he had not been legally prejudiced; and that applying the money to pay the precedent

¹ Cowp. 565.

debt was not equivalent to paying it over to his principal before he had notice of the plaintiff's equitable rights.

In the case of *Collins v. Martin*, which came before the Court of Common Pleas in England in 1797, the bills had been pledged by the plaintiff's bankers with the defendants upon an advance of money thereon. The only question there was whether a banker with whom a negotiable security had been deposited for collection could pledge it to a *bona fide* holder for money advanced to him on the credit thereof. And it was decided he could. But, in that case, the principle is again recognized that to protect the holder of a negotiable instrument against the former owner, where it has been fraudulently transferred, he must be a holder thereof for value. For Chief Justice Eyre says: "If it can be proved that the holder gave no value for the bill, then, indeed, he is in privity with the first holder, and will be affected by every thing which would affect the first holder." And in the case of *Lowndes v. Anderson*,¹ which was decided in 1810, the question was whether the defendants, who gave up a valid security which had been remitted to them in payment of a balance and to meet acceptances for a bankrupt, were answerable to his assignees for money and bills which they had received from a stranger in payment of such security, although it turned out afterwards that such money and bills belonged to the bankrupt, but which fact was concealed from their knowledge by the secret agent employed by him to transact the business. In that case again, the necessity of a valuable consideration is recognized by Chief Justice Ellenborough. For, in delivering the opinion of the court, he says: "It would be a grievous inconvenience if bank-notes could be followed, in the manner now attempted, through the hands of *bona fide* holders for a valuable consideration without notice."

I have carefully examined the several subsequent cases relied upon in the opinion of Mr. Justice Story in *Swift v. Tyson* to show that the decisions of the courts in England are in conflict with the settled law of this State upon the question now under consideration; and, as I understand those cases, only two of them — and these by implication merely — conflict in any degree with our decisions. I believe I have also examined every reported decision on the subject, down to the present time, in the English reports which have reached this country, though it is possible that some have escaped my researches. And I do not find another case or *dictum* in hostility to the principle as settled by this court in the case of *Coddington v. Bay*. The English cases subsequent to 1810, referred to by Mr. Justice Story as containing a contrary doctrine, are the cases of *Bosanquet v. Dudman*,² *Ex parte*

¹ 13 East, 130.

² 1 Stark. 1.

Bloxham,¹ *Heywood v. Watson*,² *Bramah v. Roberts*,³ and *Percival v. Frampton*.⁴ In the first case, it is evident there is a typographical error in substituting the word "but" for "who," in the fifth line of the statement of the case by the reporter. The suit was brought by the indorsees of a bill drawn by Rains upon the defendant, payable to his own order, and indorsed by him, and which had been accepted by the defendant. Clarkson & Co., who were the owners of the bill, and who kept an account with the plaintiffs' bankers in London, deposited the bill with them as collateral security for such acceptances as they might make. And at the time the bill became payable, on the 5th of February, 1812, the plaintiffs were the holders of it, and had at that time accepted bills to a much larger amount than the cash balance in their hands. They were therefore undoubtedly entitled to hold it as against Clarkson & Co. for the excess of such acceptances beyond the cash balance. But as they held other collateral securities to a considerable amount, when this bill was dishonored, they returned it to Clarkson & Co. They subsequently remitted it again to the plaintiffs, requesting them to hold it for Clarkson & Co., and to place the same to their account when paid; and the plaintiffs continued to hold the bill until Clarkson & Co. became bankrupts. Upon the trial of the cause, the defendant's counsel was proceeding to cross-examine the witness as to the comparative amount of the cash balance and collateral securities, and the amount of the acceptances on account of Clarkson & Co. at the time the bill fell due, — with a view, I presume, to show that the cash and other collateral securities were more than enough to meet all their acceptances, and that they had no lien upon this particular bill at that time, but that it belonged to Clarkson & Co. And it was in reference to that cross-examination, as I understand the case, that Lord Ellenborough said he should hold that where collateral securities were placed in the hands of a banker, under such circumstances, all the collateral securities were held for value whenever acceptances should be made from time to time, upon the credit and faith of such collateral securities, beyond the cash balance in the hands of the bankers. In other words, that it was immaterial how much the collateral securities amounted to. For, if the acceptances which had thus been made on the faith of them exceeded at any time the cash in hand to meet such acceptances, the bankers were holders of all the collateral securities for value, to secure the payment of the deficiency; and neither the depositors nor their assignees in bankruptcy could claim a return of any part of such securities, or prevent the bankers from collecting the money on them, to meet such deficiency. This was unquestionably good law, and is not a decision that, where a bill is fraudulently deposited with a

¹ 8 Ves. 531.² 4 Bing. 496.³ 1 Bing. N. C. 469.⁴ 2 C. M. & R. 180.

banker in payment or security of a pre-existing debt, he is a *bona fide* holder thereof for value, as against the party defrauded. And, if the remark of his lordship in that case meant any thing else, it is impossible to tell from the report what he did mean. For there was no claim or pretence that the bill in question did not belong to Clarkson & Co. at the time it was deposited with the plaintiffs and when it fell due; although, as between Rains, the drawer and indorser, and the defendant, the acceptor, it was a mere accommodation bill. Whether his lordship was right in holding that the return of the bill to the plaintiffs, after it was dishonored and had been paid to Clarkson & Co. by the drawer, who was in equity bound to pay it, restored the plaintiffs to all their former rights as against the accommodation acceptor, is an entirely different question. And, if the reporter is right in his statement of the facts, I think I should have decided, in such a case, that the plaintiffs could not recover against the accommodation acceptor or against Rains, the drawer, even if they had paid the whole amount of the dishonored bill in money to Clarkson & Co. upon the return thereof. Nothing further, however, is necessary to be said in reference to this very imperfectly reported case than that it decides nothing upon the question now under consideration.

In *Ex parte* Bloxham, Lord Eldon merely decided that where bills and securities are remitted to a banker, by his customer, to meet acceptances which the banker may make from time to time for his customer, such banker, as between him and his customer, has a general lien thereon for the amount of his acceptances for the customer. And that though some of the acceptances had not become due at the time the customer became a bankrupt, the banker was entitled to prove, under the commission, the amount for which he was liable upon the acceptances for the bankrupt. But that, in making such proof to cover the acceptances, the proof must be made on the securities upon which the bankrupt's name appeared, and not upon a cash balance against the bankrupt which did not exist until after the bankruptcy. If there is any thing in that decision which has the least bearing upon the question now under consideration, I am not able to discover it.

In *Heywood v. Watson*, the defendant and Morrall were co-partners, and obtained permission to overdraw their account with the plaintiffs, their bankers, from time to time, to the extent of £2,000, for which amount Morrall gave his promissory note to the plaintiffs as collateral security. The next day, he received from the defendant, his partner, a note payable to himself or order for one-half of that amount, to meet his note as collateral security to the plaintiffs for their advances, and to secure to him the repayment of the defendant's moiety of such advances, or so much as he should individually have to pay the plaintiffs

on account of the firm. The partnership was dissolved about a year afterwards, at which time the plaintiffs had made advances for the firm to the amount of £1,300, which neither of the partners had paid. Morrall had afterwards transferred the defendant's note to the bankers. But there was no evidence that he had done so without consideration, or that the plaintiffs knew for what the note was given. And the court held that the plaintiffs were entitled to recover, whether they did or did not know for what the defendant's note was given. It is true, Chief Justice Best says, if there was a good consideration between Morrall and the plaintiffs, who were ignorant of the circumstances under which Morrall took the note, they were entitled to recover. But it is evident he said this in reference to the legal rule that the indorsee of a negotiable instrument is presumed to have paid value for it, until the contrary is shown: the *onus* of disproving which, according to the decisions of the English courts, is thrown upon the party contesting the right of the holder, except where the note or bill is proved to have been lost or stolen, or to have been obtained or put in circulation by fraud. What the chief justice said in that case is not even a *dictum*, much less a decision, in opposition to the principle of law as settled in this State. For there was not a particle of equity in favor of the defendant in that case, as he was legally liable to the plaintiffs as a partner for the whole amount of their advances, even if his note had been turned out by Morrall on account thereof. And all he had to do was to pay up the amount of his note, and the other £300, if they required it, and then sue Morrall for what he had paid beyond his share.

The case of *Bramah v. Roberts* came before the court upon questions arising upon the pleadings. The plaintiffs were the indorsees of a bill of exchange drawn and indorsed by W. Clare for £500, at three months, and accepted by the defendants. To the declaration on this bill the defendants pleaded, first, the general issue; secondly, that it was accepted by them without value, was delivered by one of them to T. Hunt for a special purpose, and that he fraudulently transferred the same to the plaintiffs, with notice of his want of authority, and that there was not any consideration or value given in good faith for the indorsement of the bill to them; and, thirdly, that one of the defendants fraudulently accepted the bill, under a power to accept it for all the defendants for a special purpose, for a different purpose from what was intended, and that the other defendants received no consideration or value for such acceptance. To the second plea, the plaintiffs replied, in substance, that before the bill became due it was indorsed and delivered to them fairly and *bona fide* for a good and valuable consideration: that is to say, for moneys advanced by and due and owing to them, the plaintiffs; and without notice of the matters stated in the

second plea, or of the want of power on the part of Hunt to transfer the bill on his own account. To the third plea they replied substantially in the same manner, after denying the want of authority of one of the defendants to accept the bill for all of them. The defendants demurred specially to these replications, assigning as causes of demurrer that the plaintiffs had not stated with sufficient certainty what consideration or value was given for the bill, nor when or to whom the moneys were advanced, nor whether they were advanced at the time or had been previously advanced, nor whether the moneys advanced were sufficient to authorize them to recover the whole amount of the bill. The court decided that the third plea was bad, as it only alleged that the defendants were defrauded of the bill, and that their acceptance was without consideration; but set up no want of consideration in the negotiation of the bill to the plaintiffs, or notice of the alleged fraud, at the time they received the bill. No question was therefore decided upon the sufficiency of the replication to that plea. As to the replication to the second plea, Chief Justice Tindal thought it was sufficient; that it was only necessary for the plaintiffs to deny notice of the want of authority of the person from whom they received the bill, and aver that it was given to them for a full and valuable consideration, and that the replication was sufficient to show there was a good consideration. He says: "If money passed from the present indorsees, it appears to me sufficient, as against the acceptors of a bill of exchange, to allege that the bill was received for money advanced by and due and owing to them," &c. And, after referring to the case of a replication in which an averment that the plaintiff was parson, and took for tithes, was construed in reference to the time of severance, he again says: "A person of plain understanding will interpret this in the same way, that there has been a money consideration passing from the plaintiffs." But the chief justice went further, and declared his opinion to be that, if the replication had contained a simple denial of the allegation of a want of consideration, it would be sufficient. From his language in this case, I should infer that he understood the law to be that the holders of the bill must have received the same for a valuable consideration at the time of the transfer. But I admit that Mr. Justice Park uses the words "valid consideration" in his opinion. He says: "If the bill of exchange was indorsed and delivered to the plaintiffs for a good and valid consideration, — that is to say, for money advanced by and due and owing to the plaintiffs, — and they say that at the time it was indorsed to them they had no notice whatever of the fraud, it must be taken that the bill was taken for some antecedent debt." From this, it may perhaps be fairly inferred that he thought that was sufficient to enable the holder of the note to recover thereon, although no other

available security for such antecedent debt was given up or discharged upon the faith and credit of the bill, at the time it was so received by the plaintiffs; but he does not say so. And Justice Bosanquet says: "I am disposed to think that the replication would have been quite sufficient, if it had not added the words 'for money advanced by and due and owing to the plaintiffs,' thereby setting out the nature of the consideration; but that it was sufficient to say 'that, after the bill was made, and before it became due and payable on a specified day, the bill was indorsed and delivered to the plaintiffs fairly and *bona fide*, and for a full and valuable consideration.'" But whatever may have been the opinion of the judges who decided that case, under the new rules of pleading in England, and in reference to the fact that under any form of replication which did not admit a want of a sufficient consideration, the *onus* of proving that the bill was not passed to the plaintiffs for a good and sufficient consideration would be upon the defendants, I think it is not entitled to the weight of a judicial decision upon the question now under consideration.

In the other case, *Percival v. Frampton*, the defendant had indorsed the note for the accommodation of the maker thereof, to enable him to obtain money thereon generally. And he got it discounted by his banker, who placed the proceeds to his credit, on which he afterwards drew out £198, and the residue was applied to the balance of his account. The court held that this was equivalent to an advance of the money to him. So far, the decision was in accordance with the case of the *Bank of Rutland v. Buck*,¹ and other cases decided in this State. For the object of the indorsement being to enable the maker of the note to raise money generally, and not for any specific object in which the indorser had an interest, it was wholly immaterial to him whether the note was passed to the credit of the maker with his banker, or the banker advanced him the money on the note, and then received it back to make good his account, or the maker received the money from any other person upon the note, and then paid it to the plaintiffs for their debt. But in that case Mr. Baron Parke expresses the opinion that if the note had been given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration. From which I infer that his opinion corresponds with that of the Supreme Court of the United States upon the question now under consideration.

The question was raised by the counsel for the defendant in a subsequent case (*Bartrum v. Caddy*) that a by-gone debt is not a sufficient consideration to give a fraudulent assignee a title to recover. But, as the judgment was given for the defendant upon other grounds, no opinion was expressed by the Court of Queen's Bench upon that point.

¹ 5 Wend. 66.

And I do not think there is any decision in any court of England directly upon the question.

I have not had leisure to examine the reports of most of our sister States in reference to this subject. But, in addition to the case from Connecticut referred to in the opinion of the court in *Swift v. Tyson*, there are two decisions in the State of Maine (*Homes v. Smyth*¹ and *Norton v. Waite*²), in which it was held that the holder of a negotiable security who had received it in absolute payment of a pre-existing debt, without notice, was entitled to recover thereon, notwithstanding any failure or want of consideration, or other equities previously existing between other parties. But, as I understand the opinion of Judge Shepley in the first of those cases, a party who takes a note or bill as collateral security for the payment of such a debt, and not in absolute payment and discharge of the same, will not be entitled to protection in that State against the rightful owner.

The decision of the Supreme Court of Pennsylvania in *Petrie v. Clark*³ appears to be in accordance with the opinion of Judge Shepley in *Homes v. Smyth*. For Judge Gibson, who delivered the opinion of the court, says, if the note had been delivered in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that taking it in the usual course of business, as an equivalent for a debt which is given up, would be a purchase of it for a valuable consideration. But as it was given in pledge, for securing an antecedent debt, which was not discharged, but suffered to remain, and as it does not appear that money was advanced, or any act done that would in law be a present consideration, the case presented was against the plaintiff.

In the case under consideration, the notes which were improperly transferred by Gillespie in fraud of the rights of the owners, were not received by the plaintiff in error in payment or discharge of his debt, but as mere collateral securities for the payment thereof. He therefore would not be entitled to protection as a *bona fide* holder, for a valuable consideration, according to these decisions in the courts of our sister States. Nor do I think that the settled law of this State is so manifestly wrong as to authorize this court to overturn its former decision for the purpose of conforming it to that of any other tribunal, whose decisions are not of paramount authority.

I must therefore vote to affirm the judgment of the court below.

LOTT, SENATOR. As a general rule, the true and rightful owner of property is entitled to recover it from any person in whose possession it may be, whether obtained by the latter under color of a purchase or otherwise. An exception, however, founded on principles of commercial policy, has been made in favor of the holder of negotiable paper, received in the usual course of trade, for a valuable consideration,

¹ 4 Shepl. 177.

² 2 Appl. 175.

³ 11 Serg. & Rawle, 377.

though from a person having no right to make the transfer, and without notice of the fraud. Under such circumstances, the right of the holder is allowed to prevail against the claim of the previous owner.

To bring a case within the exception, it is not enough to show that there was a consideration for the transfer, sufficient as between the holder and the party transferring, but the consideration must be such as the law denominates a valuable one. In *Coddington v. Bay*, a case decided by this court in which the principle of the exception was fully discussed, Mr. Justice Woodworth said: "Something must have been paid in money or property, or some existing debt satisfied, or some new responsibility incurred in consequence of the transfer: this would be paying value, and making out a consideration within the reason and meaning of the rule."¹ Chief Justice Spencer there remarked: "I understand, by the usual course of trade, not that the holder shall receive the bills or notes thus obtained, as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time."² Mr. Senator Vielie observed that, "though indemnity for responsibilities is undoubtedly a good consideration for the sale or transfer of goods or negotiable paper, as against the party making it or his representatives, yet in none of the cases cited on the argument, and in no one that I have been able to find, has it ever been held to bar the true owner, upon a fraudulent transfer."³ He added: "The true test I take to be that, when the holder is left in as good a condition after a re-transfer as he would have been had no transfer taken place, there the title of the owner shall prevail. This allows the rule, so far as it is dictated by commercial policy, to have its full effect; while it protects the owner of negotiable paper, necessarily intrusted in the course of business to the care of agents, from an injury revolting to every principle of moral equity."⁴

If these doctrines are applicable to the case under consideration, and are to guide our decision, it appears to me the right of the defendants in error to the notes in question cannot be impeached.

It was contended on the argument, however, that the withdrawing of the note of Gillespie & Edwards from the bank, where it had been deposited for collection, caused a loss or prejudice to the plaintiff in error, which formed a sufficient consideration to entitle him to protection. It might be enough to say, in answer to this position, that the whole force of it is rebutted by the verdict of the jury; for, under the charge of the court, the verdict must be understood as having found that no consideration was parted with by the plaintiff in error

¹ 20 Johns. 646.

² 20 Johns. 651.

³ 20 Johns. 653.

⁴ 20 Johns. 657.

on the credit of the notes in question. But, apart from this view of the case, it appears that the note of Gillespie & Edwards was merely lodged in the bank for collection, and that there were no indorsers to be charged. A protest was therefore unnecessary; and no injury or prejudice in that respect could have resulted from the act of withdrawing it. True, it is said in the testimony that, after the note of Gillespie & Edwards was withdrawn, and before their failure, they paid "one or more notes in bank, in the regular course of business;" but the amount of these notes was not shown, nor did it in any manner appear that the note of the plaintiff in error would have been paid, had he suffered it to remain in the bank, although one of the firm of Gillespie & Edwards was examined as a witness upon the trial.

It should be remarked also that there was no stipulation or agreement by the plaintiff in error, on withdrawing his note from the bank, that he would not enforce payment of it. On the contrary, he had still a perfect right to demand its immediate payment, and to enforce his demand by action.

In every view which can be taken of this case, it appears to me the title of the defendants in error to the notes in question has not been divested, and that the judgment of the court below ought to be affirmed.

On the question being put, "Shall this judgment be reversed?" all the members of the court present who heard the argument, except Strong, Senator, voted for affirming. *Judgment affirmed.*¹

¹ In accordance with the decision of the principal case, that one who has received negotiable paper as collateral security for an antecedent debt, is not a purchaser for value, are the following cases: *Smith v. Babcock*, 2 Wood. & M. 246, 288; *In re Sime*, 12 B. R. 315 (*semble*); *McKenzie v. Branch Bank*, 28 Ala. 606; *Fenouille v. Hamilton*, 35 Ala. 319; *Bertrand v. Barkman*, 13 Ark. 150; *Iowa College v. Hill*, 12 Iowa, 462; *Ryan v. Chew*, 13 Iowa, 589; *Ruddick v. Lloyd*, 15 Iowa, 441; *Lee v. Smead*, 1 Met. (Ky.) 628; *May v. Quimby*, 3 Bush, 96; *Lapice v. Clifton*, 17 La. 152 (*semble*); *Becker v. Sandusky Bank*, 1 Minn. 311, 319 (*semble*); *Bramhall v. Beckett*, 31 Me. 205; *Nutter v. Stover*, 48 Me. 163; *Jenness v. Bean*, 10 N. H. 266; *Williams v. Little*, 11 N. H. 66; *Fletcher v. Chase*, 16 N. H. 38; *Rice v. Raitt*, 17 N. H. 116; *Scott v. Betts, Hill & Den*, 363; *Furniss v. Gilchrist*, 1 Sandf. 53 (*semble*); *Farrington v. Frankfort Bank*, 24 Barb. 554; 31 Barb. 183, s. c.; *Prentiss v. Graves*, 33 Barb. 621; *Duncan v. Gösche*, 8 Bosw. 243; *Cardwell v. Hicks*, 37 Barb. 458; *Scott v. Ocean Bank*, 23 N. Y. 289; *Comm. Bank v. Marine Bank*, 3 Keyes, 337; *West v. American Bank*, 44 Barb. 175; *American Bank v. Corliss*, 46 Barb. 19; *Atlantic Bank v. Franklin*, 55 N. Y. 235; *Holderby v. Blum*, 2 Dev. & Bat. Eq. 51; *Baggarly v. Gaither*, 2 Jones, Eq. 80; *Roxborough v. Messick*, 6 Oh. St. 448; *Quebec Bank v. Weyand*, 2 Cincinn. 538; *Petrie v. Clark*, 11 S. & R. 377; *Jackson v. Polack*, 2 Miles, 362; *Smith v. Hogeland*, 78 Pa. 252; *Van Wyck v. Norvell*, 2 Humph. 192; *Ware v. Childress*, 6 Humph. 443 (*semble*); *Vatterlien v. Howell*, 5 Sneed, 441; *King v. Doolittle*, 1 Head, 89; *Allen v. Bratton*, 47 Miss. 119; *Prentice v. Zane*, 2

GEORGE L. BROWN, EXECUTOR, &c., OF CHARLES BURRALL, DECEASED, RESPONDENT, v. GEORGE A. LEAVITT AND OTHERS, APPELLANTS.

IN THE COURT OF APPEALS, NEW YORK, JANUARY, 1865.

[Reported in 31 New York Reports, 113.]

APPEAL from the Superior Court of the city of New York. The action was brought upon a promissory note made by the defendants' firm, for \$603.10, dated March 27, 1861, payable nine months after date to the order of J. F. Zebbley & Co. The defence set up was fraud on the part of Zebbley & Co., in obtaining the note, and a total failure of consideration therefor. On the trial, the defendants showed by

Gratt. 262; Cook v. Helms, 5 Wis. 107 (*semble*); Jenkins v. Schaub, 14 Wis. 1; Bowman v. Van Kuren, 29 Wis. 209.

To the same effect are Boyd v. Beck, 29 Ala. 703; Wells v. Morrow, 38 Ala. 125; Johnson v. Graves, 27 Ark. 557; Repp v. Repp, 12 G. & J. 341; Pope v. Pope, 40 Miss. 516; Curtis v. Leavitt, 15 N. Y. 9, 178; Wood v. Robinson, 22 N. Y. 564; Cary v. White, 52 N. Y., 138; Donaldson v. Cape Fear Bank, 1 Dev. Eq. 103; Harris v. Horner, 1 Dev. & Bat. Eq. 455; Garrard v. Pittsburgh R.R., 29 Pa. 154; Ashton's Appeal, 73 Pa. 153, 162; Pratt's Appeal, 77 Pa. 378, where the subject of the transfer was property other than negotiable paper.

In accordance with the *dictum* of Walworth, C., that one who receives negotiable paper in payment of an antecedent debt is not a purchaser for value, are the following cases: Nevitt v. Bank, Freem. Ch. 438 (*semble*); Holmes v. Carman, Freem. Ch. 408 (*semble*); (see Harrison v. Pike, 48 Miss. 46); Bristol v. Sprague, 8 Wend. 423; Rosa v. Brotherson, 10 Wend. 85; Hart v. Palmer, 12 Wend. 523; Payne v. Cutler, 13 Wend. 605; Small v. Smith, 1 Den. 583; White v. Springfield Bank, 1 Barb. 225; Stewart v. Small, 2 Barb. 559; Spear v. Myers, 6 Barb. 445; Goldsmid v. Lewis Bank, 12 Barb. 407; Clark v. Gallagher, 20 How. Pr. 308; Cardwell v. Hicks, 37 Barb. 458; Chesbrough v. Wright, 41 Barb. 28; Bright v. Judson, 47 Barb. 29; Lawrence v. Clark, 36 N. Y. 128; Turner v. Treadway, 53 N. Y. 650; Fisher v. Sharpe, 5 Daly, 214; Moore v. Ryder, 65 N. Y. 438; McQuade v. Irwin, 39 N. Y. Sup'r. Ct. 396; Wormley v. Lowry, 1 Humph. 468; Ingham v. Vaden, 3 Humph. 51 (*semble*); Rhea v. Allison, 3 Head, 176; Hickerson v. Raigauel, 2 Heisk. 329.

See to the same effect Rowan v. Adams, Sm. & M. Ch. 48; Rollins v. Callender, Freem. Ch. 295; McLeod v. Nat. Bank, 42 Miss. 99; Perkins v. Swank, 43 Miss. 349; Root v. French, 13 Wend. 570; Slade v. Van Vechten, 11 Paige, 21; Van Heusen v. Radcliffe, 17 N. Y. 580; Penfield v. Dunbar, 64 Barb. 239; Fulton Bank v. Phoenix Bank, 1 Hall, 562; Scott v. Ocean Bank, 23 N. Y. 289; McBride v. Farmers' Bank, 26 N. Y. 450; Comm. Bank v. Marine Bank, 3 Keyes, 337; Hoffman v. Miller, 9 Bosw. 334; Weaver v. Barden, 49 N. Y. 286; Devoe v. Brandt, 53 N. Y. 462; Stevens v. Board of Education, 6 Th & C. 148; Schroeder v. Gurney, 10 Hun, 413, where the subject of the transfer was property other than negotiable paper.

— ED.

John F. Zebley that the plaintiff held a note of \$1,500, made by Zebley & Co., which matured in February, 1862; that, for the purpose of settling that note, J. F. Zebley & Co. and plaintiff's testator met at the office of Seymour & Co. in the month of March, 1862; that Zebley & Co. then delivered the note in suit, with several other notes, all of which were indorsed by Seymour & Co. to the plaintiff's testator, and paid the balance of the fifteen hundred dollar note in cash; and that the testator took the note in suit with the other notes, with the balance in cash, in payment of the note he held, and surrendered the old note, and delivered the same to Zebley & Co. The counsel for the defendants then offered to show the transaction between defendants and Zebley & Co. to establish the alleged defence. This was objected to; and the court held that, as the evidence then stood, the plaintiff's testator was a *bona fide* holder of the note for value, and that he became so before maturity; and that the proposed evidence was improper, irrelevant, and immaterial, unless the defendants' counsel proposed by further evidence to explain or modify the testimony of Zebley, and to show that plaintiff was not a *bona fide* holder of the note for value, which the defendants' counsel said he did not intend to do. The court thereupon excluded the proposed evidence, and directed a verdict for the plaintiff, to which defendants' counsel duly excepted. On appeal, the Superior Court, at general term, affirmed the judgment.

Marsh, Coe, & Wallis, for the appellant.

Burrill, Davison, & Burrill, for the respondents.

DAVIS, J. The note in suit was indorsed and delivered by Zebley & Co. to plaintiff's testator, before it fell due, in payment, so far as it went, of a larger note then held by the testator. It was received with other notes, and a balance in cash, as such payment of the larger note, delivered up to Zebley & Co.

In this State, it is settled by abundant authority that this transaction constituted the plaintiff's testator a holder for value of the note in question. *Bank of Salina v. Babcock*, *Bank of St. Albans v. Gilleland*,¹ *Bank of Sandusky v. Scoville*, *White v. Springfield Bank*,² *Young v. Lee*,³ *Stettheim v. Meyer*,⁴ *Mohawk Bank v. Corey*,⁵ *Meads v. Bank of Albany*,⁶ *Stalker v. McDonald*.

A further discussion of the question might lead to a suspicion that the law was in doubt on the point.

The judgment should be affirmed.

All the judges concurring, judgment affirmed.⁷

¹ 23 Wend. 311.

² 3 Sandf. 222.

³ 2 Kern. 534.

⁴ 33 Barb. 215.

⁵ 1 Hill, 615.

⁶ 25 N. Y. 149.

⁷ *Mohawk Bank v. Corey*, 1 Hill, 513 (*semble*); *White v. Springfield Bank*, 3 Sandf. 222; *Youngs v. Lee*, 12 N. Y. 551; *Stettheimer v. Meyer*, 33 Barb. 215; *Meads*

ALEXANDER H. HOLCOMB v. WILLIAM H. WYCKOFF.

IN THE SUPREME COURT, NEW JERSEY, FEBRUARY TERM, 1870.

[Reported in 35 New Jersey Reports, 35.]

THIS was an action on two promissory notes, made by defendant, and given by him to one Farrington. The consideration of the notes was certain wine plants sold by Farrington to the maker of the notes, which were drawn payable to Farrington or order, without defalcation or discount, and subsequently came to the hands of one Bryce, by whom they were sold to Holcomb at a discount, before maturity. The jury found that the notes were fraudulent and void as between the maker and Farrington. Holcomb took the notes without knowledge of the defect in the consideration on which they were founded.

The question reserved at the circuit for the consideration of this court was whether Holcomb is entitled to recover the sum for which the notes were given, or only the consideration he paid Bryce for them.

Argued at November term, 1869, before the Chief Justice, and Justices Woodhull, Depue, and Van Syckel.

For plaintiff, *George A. Allen*.

For defendant, *A. V. Van Fleet*.

DEPUE, J. In an action by an indorsee against the maker, the course of proceeding at the trial is to prove the making of the note and its indorsement, from which a consideration for the note will be implied. Upon proof being made that the note was obtained by fraud, or was fraudulently put in circulation, the plaintiff, to recover, must show that he bought it before maturity, *bona fide*, and for value. *Duncan, Sherman, & Co. v. Gilbert*.¹ Where the evidence shows that the plaintiff is a *bona fide* holder before maturity for the full value of the note, or where he has taken it from a precedent holder who has given full value, and to whose rights he has succeeded by virtue of the indorsement, he may recover the full amount of the note, without regard to defences to which it might be subject, as between the original parties. It is also the settled law in this State that where the note is valid between the original parties, and has been transferred by

v. Merchants' Bank, 25 N. Y. 143 (*semble*); *Day v. Saunders*, 1 Abb. App. 495; 3 Keyes, 347, s. c.; *Bromley v. Walker*, 51 Barb. 203; *Pratt v. Coman*, 37 N. Y. 440; *Chrysler v. Renois*, 43 N. Y. 209; *Clothier v. Adriance*, 51 N. Y. 322; *Mechanics' Bank v. Crow*, 60 N. Y. 85; *Stevens v. Campbell*, 18 Wis. 375, *accord*.

See also *Powers v. Freeman*, 2 Lans. 127; *Paddon v. Taylor*, 44 N. Y. 371. — ED.

¹ 5 Dutcher, 521.

indorsement, to pass the legal title, no defects in the contract of indorsement will affect the indorsee's right to recover the full amount of the note. *Durant v. Banta*.¹ In the case first stated, the indorsee, or some prior holder whom he represents, having paid full value on the transfer, obtains an equity to recover of the maker, who has put negotiable paper in circulation, the full consideration he or a precedent holder has paid for it. In the case last stated, the note being valid in its inception, and the maker being liable on the instrument for the full sum named therein, he cannot avail himself of defects in the consideration upon which the contract of indorsement was made.

But the case reserved presents the question whether the notes, being fraudulent and void as between the original parties, and having come to the hands of the plaintiff for a consideration less than their full value, *he* can recover beyond the consideration he actually paid.

In *Nash v. Brown*, reported in a note in *Chitty on Bills*, p. 74, the action was on a bill of exchange, which had been accepted by the defendant, as a present to the payee, by whom it was indorsed to the plaintiff for a small sum; and Lord Ellenborough held that the plaintiff was entitled to recover only so much as he had actually advanced on the bill. On the strength of this case, Professor Parsons gives, as his opinion, that where a note has been made by way of a gift, and for that reason invalid between the original parties, and has been transferred by indorsement for less than its value, in good faith, before maturity, the indorsee may recover upon it, but the recovery will be limited to the amount he has actually paid for it. 1 Parsons on Notes, 191. Where a bill has been accepted for the accommodation of the drawee, by whom it is indorsed to a third person, who advances but a part of the amount, the latter can only recover as much as he has really paid. *Wiffen v. Roberts*, *Jones v. Hibbard*. The principle is a general one, that on a bill or note, which is void between the original parties for want of consideration, as being mere accommodation paper, or having been obtained by fraud or fraudulently misappropriated, a *bona fide* indorsee for value can only recover the amount that he, or some prior holder, through whom he derives title, has paid for it. *Allaire v. Hartshorne*,² *Edwards v. Jones*,³ *Simpson v. Clark*,⁴ *Parish v. Stone*,⁵ *Stoddard v. Kimball*,⁶ *Hubbard v. Chapin*,⁷ *Williams v. Smith*, *Cardwell v. Hicks*,⁸ *Petty v. Hunnan*,⁹ *Holman v. Hobson*.¹⁰

Upon the argument, it was insisted that *Allaire v. Hartshorne* is not an authority upon the question in issue in this case, because, in the

¹ 3 Dutcher, 624. ² 1 Zab. 665. ³ 7 C. & P. 633. ⁴ 2 C., M. & R. 342.

⁵ 14 Pick. 198, 208.

⁶ 6 Cush. 469.

⁷ 2 Allen, 328.

⁸ 37 Barb. 453.

⁹ 2 Humph. 102.

¹⁰ 8 Humph. 127.

case then before the court, the indorsee took the note under an express agreement that it should be held merely as collateral security for a less sum, and that for the residue he was trustee for his indorser, as to whom the note was utterly void. In point of fact, the argument is true; but the case was decided on principles of commercial law of general application, which bear directly upon the case now under consideration. That they were understood to extend to all cases where a partial consideration has been paid for negotiable paper, which is invalid between the original parties, except where the holder is a *bona fide* purchaser, is manifest from the course of reasoning of the Chief Justice in delivering the opinion of the court, as well as from the restatement of the principles on which *Allaire v. Hartshorne* was decided by the same accurate jurist when Chancellor, in his opinion in the Court of Errors in *Duncan, Sherman, & Co. v. Gilbert*.¹

The case now before the court cannot be distinguished from *Allaire v. Hartshorne* upon any principle founded on reason or justice. In both cases, the notes were void in the hands of the original parties; and the only vitality they possessed was that which they acquired from the consideration for which they were transferred. In the one case, a portion of the sum mentioned in the note being a trust for the payee, as to whom the note was void, it was manifest that for so much the plaintiff ought not to recover; in the other case, the note being equally void, the plaintiff has no equity to recover beyond what will be indemnity for the money he paid for it.

If the fact that the contract of transfer in *Allaire v. Hartshorne* was intended to transfer to the indorsee only a limited interest in the note impairs the effect of that case as authority that objection cannot be made to some of the cases cited. In those cases, the payees had transferred their entire interest in the notes, and yet the recovery was limited to such parts of the consideration given by the indorsees as in law would be a sufficient consideration to defeat any equities the makers might have, and as to the residue the notes were held to be void. Thus, in *Cardwell v. Hicks*, which was decided in New York, where a precedent debt is not regarded as a sufficient consideration to defeat prior equities, it was held that a purchaser of a promissory note, which was fraudulently obtained, who pays for it partly in cash and partly by discharging a precedent debt due to him from the person of whom he buys, is a *bona fide* holder only to the extent of the money paid, and that he could not recover of the maker beyond that amount.

It was also insisted that the plaintiff, having purchased the notes of Bryce for a valuable consideration, without knowledge of the circumstances under which they were given, acquired by such purchase a

¹ 5 Dutcher, 527.

right to recover the full amount due on them, without regard to what he paid for them.

It is conceded that the owner of a note which is valid in its inception may sell it at any rate of discount, and the purchaser may enforce it for its full amount against the maker. *Durant v. Banta*.¹ But to make a note salable by the holder, so as to give the purchaser a right to enforce it for its face, the note must be perfect and available in the hands of the seller as against the maker, and the test of its availability in his hands is his right to maintain an action on it against prior parties at the time of the transfer, assuming it then to have been due. *Powell v. Waters*,² *Aeby v. Rapelye*,³ *Hall v. Earnest*,⁴ *Nichols v. Fearson*; ⁵ *Edwards on Bills*, 352; *Campbell v. Nichols*.⁶

The notes sued on were fraudulent and void in the hands of Far-
rington. He could not have enforced them against the maker. By
proof that they were obtained by fraud, the burden was cast on the
plaintiff of showing a consideration for some one of the subsequent
transfers that will defeat the maker's equity. What Bryce paid for
the notes does not appear. The probability is that he was a mere
agent to effect a disposition of them. In the absence of proof that he
gave value, the inference is that he was a holder without value paid.
As the case stands with respect to Bryce, he could not have recovered
on them at all. He, therefore, had no title which he could transfer by
a sale to the plaintiff, and until they reached the plaintiff's hands the
notes continued to be affected by the vice which made them void in
the hands of the original holder. If it had appeared that Bryce paid
full value for them, or gave more than the plaintiff paid, he would
then have had a real substantial interest, which by the sale would
have been transmitted to the plaintiff, and to that extent he might
have recovered. As it is, the plaintiff acquired by the purchase from
Bryce nothing beyond the naked legal title to the notes; and the only
validity they have acquired was that obtained from the consideration
paid by the plaintiff himself on the transfer to him.

The notes not being subjects of sale when they were in Bryce's
hands, the plaintiff cannot claim as a purchaser. He is merely a *bona
fide* holder for a partial consideration. As such, he may recover the
consideration he paid, and interest, but not beyond.

Judgment should be entered for the plaintiff for the sum he paid for
the notes, with interest.

The CHIEF JUSTICE and Justices WOODHULL and VAN SYCKEL
concurred.⁷

¹ 8 Dutcher, 624.

² 8 Cow. 669.

³ 1 Hill, 9.

⁴ 36 Barb. 585.

⁵ 7 Peters, 103.

⁶ 4 Vroom, 81.

⁷ *Huff v. Wagner*, 63 Barb. 215; *Harger v. Wilson*, 63 Barb. 237; *Todd v. Shel-
bourne*, 8 Hun, 510; *Petty v. Hannum*, 2 Humph. 102; *Holeman v. Hobson*, 8 Humph.
127, *accord*. —ED.

LAY v. WISSMAN.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1873.

[Reported in 36 Iowa Reports, 305.]

ACTION upon a promissory note for \$150 executed by defendant to J. L. Cory and W. G. Stone, and by them indorsed without recourse. The defendant answered under oath, denying that he signed the note sued on; denying that plaintiff is a *bona fide* holder thereof; alleging that the same was obtained by fraud without any consideration, and that plaintiff paid therefor only the sum of \$80. Trial by the court. Judgment for plaintiff. Defendant appeals. The material facts are stated in the opinion.

Clark and Haddock, for the appellant.

Fairall, Boal, and Jackson, for the appellee.

DAY, J. III.¹ It appears from the evidence that the payee of the note procured it fraudulently and without consideration, and that the plaintiff paid \$80 therefor, without any knowledge of the circumstances attending its execution. A question is presented as to the amount plaintiff is entitled to recover; whether the amount of the note, or the sum paid therefor with interest.

It is an elementary principle that the equities existing between the maker and the payee cannot be set up against the indorsee in the ordinary course of business, for a valuable consideration, in good faith, and before maturity.

There is some confusion and uncertainty in the authorities as to whether one who purchases a note for less than its face can be considered a *bona fide* holder. *Bailey v. Smith*.² In this State, however, the rule is settled that one who purchases a note at a discount may be a *bona fide* holder and entitled to recover thereon. *Sully v. Goldsmith*.³ And this view has the support of both principle and authority. *Bailey v. Smith*, *supra*; *Gould v. Segee*.⁴ The amount of the consideration paid may become important in determining whether the holder is a *bona fide* indorsee.

Where a note for \$300, on a responsible person, and nearly due, was sold for \$5, it was held that the indorsee was not a holder in good faith for value, and that he could not recover thereon, the note being with-

¹ A portion of this case relating to questions of evidence and practice has been omitted. — ED.

² 14 Ohio, 396, and cases cited.

³ 32 Iowa, 397.

⁴ 5 Duer, 270.

out consideration. *De Witt v. Perkins*.¹ The amount of consideration paid becomes an important element, in connection with the responsibility of the maker, the rate of interest, the time of maturing, and the circumstance of the transfer in determining the *bona fides* of the holder. And if he is not a purchaser in good faith, he takes the note subject to the equities growing out of the note existing between the maker and the payee. When, however, the consideration paid, and the other circumstances of the purchase, show that the indorsee is a *bona fide* holder, in the usual course of business, there is no logical principle upon which his recovery from the maker can be reduced below the amount of the note.

The defence that a note has been obtained fraudulently or without consideration does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defence does avail, for without such defence he would recover the amount evidenced by the note.

There is a class of cases in which the holder has been allowed to recover only the amount advanced upon the note. But it is believed that they will nearly, if not quite all, be found to be cases in which the holder is not a purchaser in the ordinary course of business. Thus, in *Allaire v. Hartshorne*,² the note was deposited with the holder as collateral security for a pre-existing debt. The plaintiff was the owner of the note only to the extent of the debt secured. If he had recovered more, he would have held the surplus in trust for the payee. But the payee was not entitled to recover the note, as between him and the maker being invalid. Hence, it was held, and very properly, that the holder could recover only the amount of his debt. The same principle is involved in *Williams v. Smith*, *Youngs v. Lee*,³ *Cardwell v. Hicks*,⁴ *Chicopee Bank v. Chapin*.⁵ In *Hubbard v. Chapin*,⁶ a note was given upon an illegal consideration to one Stone, for the benefit of Mallory. Stone indorsed the note to the plaintiff, who paid but a small sum thereon, and agreed to pay the balance to Mallory. It was claimed that, before paying the balance to Mallory, he had knowledge of the illegality of the consideration. It was held that, if he did acquire such knowledge, he could recover of the maker only the sum paid before he obtained information of the failure of consideration. This case falls under the same principle as those before cited.

It is essential to the utility of commercial paper, as a medium of exchange, that the parties dealing with it, so long as they act in good faith, should be allowed to regulate its value by the responsibility of

¹ 22 Wis. 473.

² 1 Zab. 665.

³ 18 Barb. 167.

⁴ 37 Barb. 458.

⁵ 8 Metc. 40.

⁶ 2 Allen, 328.

the parties bound thereby, and all the circumstances attending the transfer; and it would very much lessen the usefulness of such paper, if the purchaser for less than its face, in the ordinary course of business, holds it, *pro tanto*, subject to the defences which the maker may have against the payee.

We hold therefore that the court did not err in rendering judgment for the amount of the note. This holding is in accord with the general current of decision in this State, upon the subject of commercial paper. See *Dickerman v. Day*,¹ *Loomis & Leroy v. Metcalf & Fuller*,² *Sully v. Goldsmith*,³ *National Bank of Michigan v. Green*.⁴

Affirmed.⁵

DRESSER v. MISSOURI AND IOWA RAILWAY CONSTRUCTION COMPANY.

IN THE SUPREME COURT, UNITED STATES, OCTOBER, 1876.

[Reported in 93 United States Reports, 92.]

ERROR to the Circuit Court of the United States for the District of Iowa.

Submitted on printed arguments by *Mr. James Grant*, for the plaintiff in error, and by *Mr. George G. Wright*, contra.

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought upon three several promissory notes made by the Missouri and Iowa Railway Construction Company, dated Nov. 1, 1872, payable at two, three, and four months, to the order of William Irwin, for the aggregate amount of \$10,000.

The defence is made that they were obtained by his fraudulent representations.

But a single point requires discussion. Conceding that the present plaintiff received the notes before maturity, and that his holding is *bona fide*, the question is as to the amount of his recovery.

Under the ruling of the court he recovered \$500. His contestation is that he is entitled to recover the face of the note, with interest.

After the evidence was concluded, the plaintiff asked the court to charge the jury that, if they believed from the evidence that the plaintiff purchased the notes in controversy of William Irwin for a

¹ 31 Iowa, 444.

² 31 Iowa, 382.

³ 32 Iowa, 397.

⁴ 33 Iowa, 140.

⁵ *In re Gomersall*, 1 Ch. D. 137; *Jones v. Gordon*, 2 App. Cas. 616, s. c. (*semble*); *Schoen v. Houghton*, 50 Cal. 528; *Gould v. Segee*, 5 Duer, 260, *accord*. — ED.

valuable consideration, on the 1st of November, 1872, and paid \$500, part of the consideration, on the 21st of January, 1873, before any notice of any fraud in the contract, he was entitled to recover the whole amount of the notes; and the court refused this instruction. But the court charged the jury:—

“That, in the first place, the jury must find that there was fraud in the inception of the notes as alleged; and that, if the defendants failed to satisfy the jury of that fact, the whole defence fails.

“That if the fact of fraud be established, and the jury find from the evidence that the plaintiff paid \$500 upon the notes without notice of the fraud, and that after receiving notice of the fraud the plaintiff paid the balance due upon the notes, he is protected only *pro tanto*; that is, to the amount paid before he received notice.”

It does not appear that, upon the purchase of the notes in suit, the plaintiff gave his note or other obligation which might by its transfer subject him to liability. His agreement seems to have been an oral one merely,—to pay the amount agreed upon, as should be required; and he had paid \$500, and no more, when notice of the fraud was brought home to him.

The argument of the plaintiff in error is that negotiable paper may be sold for such sum as the parties may agree upon, and that, whether such sum is large or small, the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes in suit for \$500, before maturity and without notice of any defence, and paid that sum, or given his negotiable note therefor, the authorities cited show that the whole interest in the notes would have passed to him, and he could have recovered the full amount due upon them. *Fowler v. Strickland*,¹ *Park Bank v. Watson*,² *Bank of Michigan v. Green*.³ The present case differs from the cases referred to in this respect. The notes in question were purchased upon an unexecuted contract, upon which \$500 only had been paid when notice of the fraud and a prohibition to pay was received by the purchaser. The residue of the contract on the part of the purchaser is unperformed, and honesty and fair dealing require that he should not perform it; certainly, that he should not be permitted, by performing it, to obtain from the defendants money which they ought not to pay. As to what he pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party. One who pays with knowledge of a fraud is in no better position than if he had not paid at all. He has no greater equity, and receives no greater protection. Such is the rule as to contracts gene-

¹ 107 Mass. 552.

² 42 N. Y. 490.

³ 33 Iowa, 140.

rally. In the case of the sale of real estate for a sum payable in instalments, and circumstances occur showing the existence of fraud or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards. *Barnard v. Campbell*,¹ *Lewis v. Bradford*,² *Juvenal v. Jackson*,³ *Youst v. Martin*.⁴

In *Weaver v. Barden*,⁵ the court use this language: "To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid. Where a man purchases an estate, pays part and gives bonds for the residue, notice of an equitable incumbrance before payment of the money, though after giving the bond, is sufficient. *Touville v. Naish*,⁶ *Story v. Lord Windsor*.⁷ Mere security to pay the purchase price is not a purchase for a valuable consideration. *Hardingham v. Nicholls*,⁸ *Maundrell v. Maundrell*,⁹ *Jackson v. Cadwell*,¹⁰ *Jewell v. Palmer*.¹¹ The decisions are placed upon the ground, according to Lord Hardwicke, that if the money is not actually paid the purchaser is not hurt. He can be released from his bond in equity."

The plaintiff here occupies the same position as the *bona fide* purchaser of the first of a series of notes, of which, after notice of a fraud, he purchases the rest of the series. He is protected so far as his good faith covers the purchase, and no farther.

Upon receiving notice of the fraud, his duty was to refuse further payment; and the facts before us require such refusal by him. Authorities, *supra*.

*Crandell v. Vickery*¹² is in point. Holdridge had obtained the indorsement by Vickery of his (Holdridge's) notes by false and fraudulent representations. These notes were transferred to Crandell without notice or knowledge of the fraud, he giving to Holdridge several checks for the amount, upon the understanding that they were not to be presented for payment, but when the money was wanted he was to give new checks as needed. Before giving the new checks, plaintiff was informed of the fraud, and requested not to make payment or to give his checks. He did, however, give his new checks, according to the original agreement, and brought suit upon the notes against Vickery, the indorser.

It was held that he was not a *bona fide* holder, for the reason that the transaction was executory when he received notice of the fraud;

¹ 53 N. Y. 73.

² 10 Watts, 82.

³ 2 Harris, 529; id. 430.

⁴ 3 S. & R. 423, 430.

⁵ 49 N. Y. 291.

⁶ 3 P. Wms. 306.

⁷ 2 Atk. 630.

⁸ 3 Atk. 304.

⁹ 10 Ves. 246, 271.

¹⁰ 1 Cowen, 622.

¹¹ 7 J. C. 65.

¹² 45 Barb. 156.

that he had then parted with no value; that the real obligations were given afterwards, and under circumstances that afforded no protection.

That case is stronger for the holder than the one before us, in the fact that checks were there given on the original transaction, which might have been presented or passed off to the prejudice of the maker; while here the transaction was oral throughout.

To the same purport in principle, although upon facts somewhat different, are the cases of *Garland v. The Salem Bank*,¹ *The Fulton Bank v. The Phoenix Bank*,² and *White v. Springfield Bank*.³

The cases are numerous that where a *bona fide* holder takes a note misappropriated, fraudulently obtained, or without consideration, as collateral security, he holds for the amount advanced upon it, and for that amount only. *Williams v. Smith*.

In *Allaire v. Hartshorne*,⁴ the case was this: Hartshorne sued Allaire on a note of \$1,500 at ninety days, made by Allaire. It was proved that the note had been misapplied by one Pettis, to whom it had been intrusted; that he had pledged it to the plaintiff as security for \$750 borrowed of him on Hegeman's check, and also as security for a \$400 acceptance of another party then given up to Pettis.

On the trial, the court charged the jury that, if any consideration was given by the plaintiff for the note, "they should not limit their verdict to the amount so given, but should find the whole amount due on the face of the note." The case was carried to the Court of Errors and Appeals of the State of New Jersey, upon an exception to this charge. The court reversed the judgment, holding that, although a *bona fide* holder, Hartshorne could recover only the amount of his advances.

The case before us is governed by the rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser.

No respectable authority has been cited to us sustaining a contrary position, nor have we been able to find any. The judgment below is based upon authority, and upon the soundest principles of honesty and fair dealing. It has our concurrence, and is affirmed.⁵

¹ 9 Mass. 408.

² 1 Hall, 562.

³ 3 Sandf. (S. C.) 227.

⁴ 1 Zab. 663.

⁵ *Hubbard v. Chapin*, 2 All. 328; *Youngs v. Lee*, 12 N. Y. 551; *De Mott v. Starkey*, 3 Barb. Ch. 406; *Crandall v. Vickery*, 45 Barb. 156; *Stevens v. Corn Exch. Bank*, 3 Hun, 147, *accord*.

See to the same effect *Jones v. Stanley*, 2 Eq. Abr. 685, pl. 9; *Tourville v. Naish*, 3 P. Wms. 307; *Harrison v. Southcote*, 1 Atk. 588; *Story v. Windsor*, 2 Atk. 630; *Hardingham v. Nichols*, 3 Atk. 304; *Maundrell v. Maundrell*, 10 Ves. 246, 271; *Molony v. Kernan*, 2 Dr. & W. 31; *Wormsley v. Wormsley*, 8 Wheat. 449; *Wood v. Mann*, 1

Sumn. 506; *Dufphey v. Frenaye*, 5 St. & Port. 215; *Duncan v. Johnson*, 13 Ark. 190; *Brown v. Welch*, 18 Ill. 343; *Keys v. Test*, 33 Ill. 316; *Simms v. Richardson*, 2 Litt. 274; *Palmer v. Williams*, 24 Mich. 328; *Losey v. Simpson*, 3 Stockt. 246; *Frost v. Beckman*, 1 Johns. Ch. 288; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Farmers' Co. v. Maltby*, 8 Paige, 361; *Harris v. Norton*, 16 Barb. 264; *Genet v. Davenport*, 66 Barb. 412; *Snelgrove v. Snelgrove*, 4 Dess. 274, 287; *Youst v. Martin*, 3 S. & R. 423; *Union Co. v. Young*, 1 Whart. 410; *Juvenal v. Jackson*, 14 Pa. 519; *Beck v. Urich*, 13 Pa. 639; *Pillow v. Shannon*, 3 Yerg. 508; *Doswell v. Buchanan*, 3 Leigh, 365; *Everts v. Agnes*, 4 Wis. 343, where the subject of the transfer was property other than negotiable paper.

Conf. *Bancroft v. McKnight*, 11 Rich. 663. — Ed.

SECTION IV.—*Continued.**Purchase for Value without Notice — (continued).*

(c) NOTICE.

MORE v. MANNING.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1718.

[*Reported in Comyns, 311.*]

THIS was an action of assumpsit upon a promissory note given by Manning to Statham and order; Statham assigns it to Witherhead, and Witherhead to the plaintiff; and upon a demurrer to the declaration an exception was taken, because the assignment was made to Witherhead, without saying to him and order, and then he cannot assign it over, for by this means Statham, who had assigned it to Witherhead without subjecting himself to his order, will be made liable to be sued by any subsequent indorsee. And to this the Chief Justice at first inclined, but afterwards it was resolved by the whole court that it was good.

For if the original bill was assignable (as it will be, if it be payable to one and his order), then he, to whomsoever it is assigned, has all the interest in the bill, and may assign it as he pleases, for the assignment to Witherhead is an absolute assignment to him, which comprehends his assigns, and therefore nothing is done when the bill is assigned but indorsing the name of the indorser, upon which the indorsee may write what he will, and at a trial, when a bill is given in evidence, the party may fill up the blank as he pleases.¹

¹ *Acheson v. Fountain*, 1 Stra. 557, *accord.*
See *Dehors v. Harriot*, 1 Show. 163. — ED.

EDIE AND LAIRD v. THE EAST INDIA COMPANY.

IN THE KING'S BENCH, TRINITY TERM, 1761.

[Reported in 1 *William Blackstone*, 295.¹]

ACTION on two bills of exchange of £2,000 each, drawn by R. Clive on the East India Company, at three hundred and sixty-five days after date, payable to R. Campbell or order. Campbell indorsed one to Ogleby or order, the other to Ogleby, without adding the words "or order." But, at the trial, the words "or order" appeared upon the indorsement in another handwriting. The East India Company accepted both bills. Ogleby then indorsed them to the plaintiffs, and soon after became insolvent. The Company then refused payment. The jury found a verdict for the plaintiffs on the first bill, but for the defendants on the second; apprehending that by the usage of merchants it was not assignable, without the words "or order" in Campbell the payee's indorsement.

Morton moved for a new trial. 1st, Because the bill, being once negotiable, could not lose its negotiability by Campbell's writing on it some words, and omitting others. *Moore v. Manning*. Words "or order" being omitted in an indorsement, still the bill is payable to order, if so in the original draft. *Acheson v. Fountain*,² *Evans v. Cramlington*. 2d, On the footing of surprise; the plaintiff not being prepared to give evidence of the custom of merchants, and the evidence given by defendants being not of facts, but merely of opinion. *Yates, S. S.*

Norton and *Wedderburn* showed cause. 1st, That custom is the foundation of all bills of exchange; and the custom of merchants is matter of law, not of fact: so is properly evidenced by opinion. A payee or indorsee, when the draught or indorsement is general, is absolute owner of the bill; he is the purchaser of it: value received is implied. He may destroy its negotiability. If he indorses it with negative words, as, "to J. N., and nobody else," will any man seriously contend that it is payable to any one else? Will any man take it? And if putting negative words on it would have destroyed its negotiability, then omitting the words "or order" amounts to the same thing. It is an implied negative. Campbell might have indorsed it in blank (*i. e.* by only writing his own name), and then I agree that any one might have overwrote what he pleased upon it. The pre-

¹ 2 Burr. 1216, s. c. — Ed.² 1 Str. 557.

sumption in such case is that he meant to make it of the greatest possible use to his indorsee. But, having once put the terms of indorsement upon it, this destroys the other presumption. All subsequent indorseees take it under the new terms imposed upon it. It is now a naked authority to Ogleby to receive the money. Such a special indorsement does not import value received, for Ogleby might only be agent or factor for the indorser. *Moore v. Manning* is hardly law. It is contrary to the reason which arises from the case itself. For the reason of such special indorsement in that case seems to have been that the indorser was a creditor to the special indorsee. Had therefore the bill been protested for non-payment, the indorsee had effects of the indorser's in his hands sufficient to indemnify himself. But, upon a general indorsement, the indorser might have been called upon, at a distance of time, by any subsequent indorsee, which might have been very inconvenient. 2d, The footing of surprise, if true, is no ground for new trial. If this be allowed, new trials would be always moved for, whenever the losing party thinks he can mend his evidence.

Morton, in reply, insisted that the supposition of law is equally strong, that a special indorsee is a purchaser, as well as a general one. For he might have resorted to Campbell as well as to Ogleby.

LORD MANSFIELD, C. J. There can be no dispute where the indorsement is in blank. There you may write over it whatever you please. And it has been permitted to be done even in court. But for this there is no occasion. Every thing shall be intended upon such a blank indorsement. The point relied on at the trial for defendants was that where a special indorsement was made to A. B., and the indorser omitted the words "or order," this was equivalent to the most restrictive indorsement. Many witnesses were examined by defendants to prove this usage; but it did not appear that in any one fact the indorsee of such special indorsement ever lost the money by such omission. The evidence was only matter of opinion.

I told the jury that upon the general law (laying usage out of the case) the indorsement carried the property to Ogleby, and that the negotiability was a consequence of the transfer.

But if they found an established usage among merchants, that where the words "or order" were omitted the bill was only negotiable on the credit of the indorsee, they should find for the defendants. If otherwise, or they were doubtful, then either for the plaintiffs, or make a case of it. They found for the defendant on the bill in question; for the plaintiff on the other, concerning which there was no dispute.

Now, upon the best consideration I have been able to give this matter, I am very clear of opinion that at the trial I ought not to have admitted the evidence of usage. But the point of law is here settled;

and, when once solemnly settled, no particular usage shall be admitted to weigh against it: this would send every thing to sea again. It is settled by two judgments in Westminster Hall, both of them agreeable to law and to convenience. The two cases I go upon are *Moore v. Manning* in Comyns and *Acheson v. Fountain* in Strange. These cases go upon a general proposition in law, that an indorsement to A. implies "or order," and is negotiable.

The main foundation is to consider what the bill was in its origin. The present bill, in its original creation, was not a bare authority, but a negotiable draught. There are no restrictive words in it. And whatever carries the property carries the power to assign it.

It were absurd if the merchants' opinion should prevail, that this is now converted into a personal authority. If it be such, that the indorsee dies, it could not go to his executors and administrators, in whom most clearly the property of the bill does vest.

Upon this ground, that the point is settled both by King's Bench and Common Pleas, and well settled, I think there should be a new trial. Otherwise, also, I should be of the same opinion. Certainly, the suggestion of surprise is not in all cases a reason for a new trial; but in particular cases, such as the present, it may be. The question of costs is very peculiar. There is a verdict in part for the plaintiff, which already carries costs for him. But, for form's sake, we must set aside the whole verdict, which is usually done on payment of costs. But this would be giving defendants costs, which they could not otherwise have, merely because they have obtained an improper verdict. Therefore, I think that under these particular circumstances the verdict should be set aside without costs.

DENISON, J. I am of the same opinion. If the words "to A. B. only" were inserted, I should think it would not be restrictive: at least, it should be left to a jury. In *Rawlinson v. Stone*, an inland bill of exchange was drawn payable to A. or order, who indorsed it to B. without adding any thing more. The question was whether there was such an interest in the executor of the assignee as that he might assign it. The court held, upon inquiry from merchants, that it might be indorsed thus: "C., executor or administrator of B." When a man says, "pay to A.," the law says it is "to A. or order." He then says, I intend it should not be so. What signifies what you intend? The law intends otherwise. Same opinion as to costs.

FOSTER, J. I am of the same opinion. This is now the settled law, and ought not to have been left to a jury. People talk of the custom of merchants. This word "custom" is apt to mislead our ideas. The custom of merchants, so far as the law regards it, is the custom of England; and therefore Lord Coke calls it, very properly, the law-

merchant. We should not confound general customs with special local customs. I think there should be no costs.

WILMOT, J. There are two questions. Whether the law is fully settled, and upon what principles? It is certainly now settled, and upon these principles. The original contract between the drawer and payee is to pay to the payee and his assigns, and the assigns of such assigns, *in infinitum*. There is the same privity between the drawer and the last assignee as the first. The first assigns over that chose in action, which, in its nature and by the express permission of law, is assignable, with the same privileges and advantages that it had when he received it. It might be a considerable question whether a man can limit and modify the property or not, even by express words of restriction, so as to check its currency. By giving a bare authority, he may do it; as, "Pay to A. for my use." But, if he indorses it generally, I should have a great doubt, supposing it purchased by a subsequent indorsee for a valuable consideration. In the present case, I think assigning it to A. carries the property with all its qualities. It implies a consideration to have been given. I have a note of Acheson v. Fountain. Mr. Wearg then cited a case so determined in Common Pleas, probably that of Moore v. Manning. Another case shows the liberality with which indorsements have been construed. Fisher v. Pomfret.

The question was whether indorsement to the order of A. will enable A. to maintain an action. Determined, that it will. If so, *a fortiori*, an indorsement to A. will enable him to indorse it. Custom of merchants is the general universal law. Facts must be reiterated to make such a custom. The opinion of merchants is nothing. Special custom of merchants has been controlled in a case where an indorser had divided a note and indorsed it to several persons. Hawkins v. Cardy.

Held, that the indorser cannot vary the original contract, and split one note into twenty. Determined to be a void custom, though allowed to be the custom of merchants. Same opinion as to costs.

*New trial was granted without payment of costs.*¹

¹ Cunliffe v. Whitehead, 3 B. N. C. 828, 830; Brown v. De Winton, 6 C. B. 336, 362; Holmes v. Hooper, 1 Bay, 160; Hodges v. Adams, 19 Vt. 74, *accord*. — ED.

ANCHER AND OTHERS v. THE GOVERNOR & CO. OF THE
BANK OF ENGLAND.

IN THE KING'S BENCH, MAY 10, 1781.

[*Reported in 2 Douglas, 637.*]

ONE Captain Dahl, a Dane, and resident in Denmark, being indebted to the house of Claus Heide & Co., in London, applied to one Mæstue to procure him a bill, in order to discharge the debt. Mæstue accordingly obtained a bill from the plaintiffs at Christiana on Claus Heide & Co., with whom they had a correspondence, which bill was as follows:—

“CHRISTIANA, Jan. 17, 1778.

“Two months after sight, please to pay this, our sola bill of exchange, to Mr. Jens Mæstue, or order, one hundred and twenty pounds sterling, value in account, and place it to account, as per advice from Karen—widow of Christian Ancher—& Sons.

“TO MESSRS. CLAUS HEIDE & CO., OF LONDON.”

On this bill was written by Mæstue an indorsement, in the Danish language, of this import:—

“The within must be credited to Captain Morten Larsen Dahl, value in account.

“CHRISTIANA, Jan. 17, 1778.

JENS MÆSTUE.”

And it was remitted to Claus Heide & Co. in the following letter:—

“Agrecable to the desire of Captain Morten Larsen Dahl, of Arendall, I have enclosed, for his account, sent you Karen Ancher & Sons' bill, on yourselves, for £120, which you will, on receipt, be pleased to credit his account with, and advise him of the same.”

The bill was received by Claus Heide & Co., and accepted; and they gave notice to the plaintiffs and to Dahl that they had received it, and placed it to his account. Afterwards, a forged indorsement, in English, was written upon it as follows:—

“For me, to pay Mr. Detleff D. Muller, or order. MORTEN L. DAHL.”

Muller, who was a clerk in the house of the acceptors, carried the bill, thus indorsed, but which never had been in the hands of Dahl, to the bank, and indorsed it with his own name, upon which it was discounted, in the ordinary course of business. When the day of payment came, the acceptors having become insolvent, and Muller having absconded, the bill was protested; and one Fulberg, as a friend or

agent for the plaintiffs, came to the bank, and paid it for their honor as the drawers; but, the forgery having been discovered, this action for money had and received was brought against the bank, on the ground that the bill was not negotiable on account of the special indorsement, and that it had therefore been discounted by the bank, in their own wrong, and the money paid by Fulberg, to take it up, paid by mistake.

The cause was tried at Guildhall, before Lord Mansfield, at the sittings after last term, when his lordship directed a nonsuit; and it now came on in court, on a motion for setting aside the nonsuit, and granting a new trial.

The *Attorney-General*, for the defendants. The bank is perfectly innocent of any fraud. The bill was in their hands for a valuable consideration. The drawers, by bringing this action, adopt the payment by Fulberg, and make him their agent; and, when a drawer pays a bill, it becomes a matter of account between him and the acceptor, and all the indorsers are discharged. This bill was originally drawn payable to order; but the particular indorsement, it is said, made it not negotiable. There can be no doubt, however, but that Dahl might still have indorsed and negotiated it. It is true, as his name is forged, he never can be called upon as an indorser; but his debt is discharged by the credit given him by Claus Heide & Co.

Dunning and Davenport, for the plaintiffs. The bill was taken up by the plaintiffs' agent, without authority; but it was *bona fide*, and for the best, and therefore they have done right to indemnify him. The parties are all innocent; but the bank have been negligent, and the mistake in paying them ought to be rectified. The *Attorney-General's* rule, as to the discharge of indorsers, by the payment by the drawer, applies only where the drawer has paid with a full knowledge of the circumstances. If the bank, in this case, could not have sued the drawers, they cannot retain the money, which brings it to the question whether a bill that has once been negotiable must always continue so, and cannot have that quality restrained by a particular indorsement, as, "Pay to A B, and no one else," or the like. The constant practice with regard to remittances of rents from the country shows that negotiability may be restrained in that manner. Those remittances are made by bills payable to order, but are generally indorsed by the payee to his banker, without saying "or order," for the express purpose of stopping their negotiability. If a bill gets to the drawee, its negotiability ceases. This had been in the hands of the drawees. Notice was given by them to the plaintiffs that they had received it, and to Dahl that they had applied it to the discharge of his debt.

LORD MANSFIELD. The ground of the nonsuit was that the purpose for which the bill was drawn was answered, it having been applied to the credit of Dahl, and he having acquiesced. It therefore occurred to me that the drawers had received no injury, and had no interest. But (which was not attended to at the trial) there has been a second payment for the honor of the plaintiffs; and it is contended that a consideration has arisen on that second payment. Where there is equal equity, possession must prevail; and the equity is equal between persons who have been equally innocent and equally diligent. The question, therefore, is whether the bank has been equally diligent. A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined upon argument. A blank indorsement makes the bill payable to bearer; but, by a special indorsement, the holder may stop the negotiability. Mæstue did so here. It does not seem to me that, after the special indorsement by Mæstue, Dahl himself could have indorsed it over. Mæstue did not mean to make himself answerable as an indorser, or to enable Dahl to raise money on the bill. The bank could not have maintained an action on the bill against the plaintiffs. It was their negligence not to read the special indorsement.

WILLES, J. I am of the same opinion. The question is whether the negotiability is not restrained by the indorsement; and I think it is. The bank either did read or ought to have read the indorsement. The only doubt is, what should be the effect of the bill's having been taken up by a third person; but I think he must be taken to be the agent of the plaintiffs.

ASHURST, J. I am of the same opinion. The question is, did the bank use due diligence. If they had attended to the indorsement, they would not have discounted the bill. I think Dahl himself could not have indorsed it. It was never the intention that Claus Heide & Co. should pay money to Dahl, but only that the amount should be set off in his account. If the bank have taken a bill not negotiable, it is their own fault, and they are not entitled to retain the money which has been paid them by mistake.

BULLER, J. I have the misfortune to differ from the rest of the court. As to the forgery, it was decided in the case of *Price v. Neale*, in this court, that, if a forged bill has been taken up, the money shall not be recovered back from an innocent indorsee. Therefore, as against such an indorsee, the forgery is not material. As to the indorsement by Mæstue, it amounts to an indorsement to Dahl, and makes him the proprietor; and, the bill being originally negotiable, it seems to me to have continued so. What is called a restrained indorsement, viz. that the bill was to be credited to Dahl, appears to amount to the same

thing as "Pay to Dahl." The words "or order" are omitted; but it has been determined that such omission does not stop the negotiability of a bill. The circumstance that there was an account between Dahl and the drawees cannot affect third persons who knew nothing of that account. But, if the bill was only meant to pay the drawees, why was it not cancelled by them when they received it? Why did they accept it? Did not that hold out negotiability to the rest of the world? This is an answer to any supposed negligence in the defendants. Besides, if the bill was not meant to be negotiable, why did the plaintiffs take it up? That was done by another person, as it is said, for their honor; but they have, by bringing the action, adopted his act.

LORD MANSFIELD. The whole turns on the question whether the bill continued negotiable. As the case stands at present, let the nonsuit be set aside; but we will consider of it farther, and if we alter our opinions we will mention it.

The case was never mentioned any farther.

*The rule made absolute.*¹

SIR JOHN LAWSON AND OTHERS v. WESTON AND OTHERS.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JULY 16, 1801.

[Reported in 4 *Espinasse*, 56.]

THIS was an action brought to recover the amount of a country bill of exchange for £500, drawn by one Vazie in favor of Stokoe, at fifty days, on the defendants, who were the partners of the Southwark Bank, and accepted by them.

The plaintiffs were the members of the Richmond Bank, in Yorkshire, where they resided. They had discounted the bill in the usual course of their business, at Richmond, for a person who brought it to their shop, but who was unknown to them; but the bill had been drawn in their neighborhood, at Newcastle, and they were perfectly acquainted with all the handwriting of the several parties to it.

The bill had been regularly indorsed by Stokoe to a person of the name of Shears, who had also put his name to it. Shears lost it, or it was stolen from him; but it was proved that he had advertised it immediately on its being lost.

The names of Stokoe and Shears were on the back of the bill; and, on its being discounted, the person who discounted was desired to put

¹ The cause was again tried at the ensuing sittings, before Lord Mansfield, when the jury, by his lordship's directions, found a verdict for the plaintiffs.

his name on it: he put the name of John Warren on it; and no further inquiry was made by the plaintiffs, who paid him the amount, deducting the discount.

The defendants were indemnified by Shears.

The *Attorney-General* stated the grounds upon which the payment of the bill was resisted. That he was in possession of evidence to show that the bill was the property of Shears, by whom it had been lost; that Shears had advertised it, and so given notice to have it stopped in payment; that, though a person might pay a bill to which he was a party to one who had come dishonestly by it, by reason of the personal liability attached to his name on the bill, a banker or any other should not discount a bill for a person unknown without using diligence to inquire into the circumstances as well respecting the bill as of the person who offered to discount it; that it was the usual course of the banking trade, which he was prepared with evidence to show, that, where a bill of the amount of the present was offered for discount, never to do it without making such inquiries; and that he would call several bankers to prove to that effect.

LORD KENYON. I think the point in this case has been settled by the case of *Miller v. Race* in Burrow. If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount: it would apply as well to a bill for £10 as for £10,000.

With respect to the evidence offered of the usage of other banking houses, I cannot admit it: it depends on their mode of doing their business, or on their funds. This could not affect others who acted on different principles, but with equal integrity. That which had been called the usage of trade depended on the different degree of confidence which different men possessed, and not on any settled or regular rules.

The magnitude of the bill has been pressed as a ground of suspicion by the defendant's counsel. I do not feel it of such importance. A person going to the country, and having occasion to bring a sum of money, might prefer bringing it in that way rather than in money. I therefore see no misconduct imputable to the plaintiffs; but I think

they are bound, under the circumstances of the case, to prove the value actually paid for it.

The plaintiffs proved the consideration paid for it, and had a verdict.¹

CHALMERS AND OTHERS *v.* LANION.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 24, 1808.

[Reported in 1 *Campbell*, 383.]

ACTION by the indorsees of a bill of exchange against the acceptor.

One of the grounds of defence was that the bill had been accepted for a debt contracted in a smuggling transaction; and that, although it had been indorsed for value before it became due to a *bona fide* holder, yet that it had been indorsed by him to the present plaintiffs after it was due. The counsel for the defendant allowed that the first indorsee might have sued upon it, *Newby v. Smith*; ² but contended that it came disgraced to the plaintiffs; that they took it subject to all the deficiencies under which it had at any time labored; and that it was now competent to the defendant to give the original consideration in evidence, in the same manner as if the action had been brought by the payee. But

LORD ELLENBOROUGH held that, if the plaintiffs received the bill from a person who might himself have maintained an action upon it, the circumstance of the indorsement to them having been made after the bill had become due was insufficient to let in the proposed defence; and, on a motion for a new trial, the other judges of King's Bench declared themselves of the same opinion.³

¹ *King v. Milson*, 2 *Camp.* 5, *accord.*

See *Egan v. Threlfall*, 5 *Dow. & R.* 326 n. — *Ed.*

² 2 *Esp. Cas.* 539.

³ *Masters v. Ibberson*, 8 *C. B.* 100; *Carruthers v. West*, 11 *Q. B.* 143; *May v. Chapman*, 16 *M. & W.* 355; *Fairclough v. Pavia*, 9 *Ex.* 690; *Commissioners v. Clark*, 94 *U. S.* 278; *Stamper v. Hayes*, 25 *Ga.* 546; *Hogan v. Moore*, 48 *Ga.* 156; *Woodworth v. Huntoon*, 40 *Ill.* 131; *Hereth v. Merchants' Bank*, 34 *Ind.* 380, 384 (*semble*); *Riley v. Schawacker*, 50 *Ind.* 592; *Peabody v. Rees*, 18 *Iowa*, 571; *Simonds v. Merritt*, 33 *Iowa*, 537; *Mornyer v. Cooper*, 35 *Iowa*, 257; *Cotton v. Sterling*, 20 *La. An.* 282; *Howell v. Crane*, 12 *La. An.* 126; *Cook v. Larkin*, 19 *La. An.* 507; *Smith v. Hiscock*, 14 *Me.* 449; *Hascall v. Whitmore*, 19 *Me.* 102; *Dudley v. Littlefield*, 21 *Me.* 418; *Woodman v. Churchill*, 52 *Me.* 58; *Roberts v. Lane*, 64 *Me.* 108; *Dillingham v. Blood*, 66 *Me.* 140; *Boyd v. McCann*, 10 *Md.* 118; *Barker v. Parker*, 10 *Gray*, 339; *Kost v. Bender*, 25 *Mich.* 515; *Williams v. Matthews*, 3 *Cow.* 260; *Britton v. Hall*, 1 *Hilt.* 528; *Bassett v. Avery*, 15 *Oh. St.* 299; *Wilson v. Mechanics' Bank*, 45 *Pa.* 494; *Watson v. Flanagan*, 14 *Tex.* 354; *Prentice v. Zane*, 2 *Gratt.* 262; *Kinney v. Kruse*, 28 *Wis.* 183, *accord.*

To the same effect are *Harrison v. Forth*, *Prec. Ch.* 51; *Noble v. Cornell*, 1 *Hill*, 98; *Brandlyn v. Ord*, 1 *Atk.* 571; *Lowther v. Carlton*, 2 *Atk.* 242; *Mertins v. Jolliffe*

ROBERTSON *v.* KENSINGTON AND OTHERS.

IN THE COMMON PLEAS, JUNE 22, 1811.

[Reported in 4 *Taunton*, 30.]

THIS was an action of assumpsit; and the first count in the declaration was on a bill of exchange, of which the following is a copy, viz.:—

“£180 sterling.

EDINBURGH, Nov. 18, 1808.

“At 45 days after date, pay this first of exchange to the order of Mr. Robert Robertson, £180 sterling, value received, which place to account, as advised.

W. FORBES, J. HUNTER & Co.

“TO MESSRS. KENSINGTON, STYAN, &
ADAMS, BANKERS, LONDON.”

“Accepted, Kensington & Co. Entered, P. J. Raeburn. Indorsed, Edinburgh, Nov. 19, 1808. Pay the within sum to Messrs. Clerk & Ross, or order, upon my name appearing in the ‘Gazette,’ as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date. R. Robertson, Clerk & Ross, J. Tindale, Thomas Eyre & Sons, Thomas Nelson, Dudding & Nelson, Bank of England.”

The plaintiff declared as payee, against the defendants as acceptors. The declaration also contained counts for money had and received by the defendants to the use of the plaintiff, for money paid by the plaintiff to the use of the defendants, on an account stated, and for interest.

The plea was the general issue. At the trial of this cause before Mansfield, C. J., and a special jury, at the sittings after Hilary term, 1811, at Guildhall, a verdict was entered by consent for the plaintiff for the sum of £180, subject to the opinion of the court on the following case: The bill, which was for £180, was drawn at Edinburgh on the 18th November, 1808, by Sir William Forbes, J. Hunter & Co.,

Amb. 313; *Sweet v. Southcote*, 2 Bro. C. C. 66; *M’Queen v. Farquhar*, 11 Ves. 467, 478, where purchasers of the legal estate, with notice of incumbrances, were allowed to shelter themselves under the rights of prior purchasers without notice.

But the owner of the legal estate, subject to a trust or incumbrance, cannot, by a conveyance of the legal estate to a purchaser for value, without notice, and a reconveyance to himself, acquire the rights of his predecessor, but is remitted to his original position. *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Bailey v. Bailey*, 61 Me. 361. And the same principle applies to the transfer of negotiable paper. *Dillingham v. Blood*, 66 Me. 140; *Kost v. Bender*, 25 Mich. 515; *Calhoun v. Albin*, 48 Mo. 304.
—ED.

upon the defendants, who are bankers in London, payable to the order of the plaintiff, at forty-five days' date, for value received. The indorsements by the plaintiff, and by Clerk & Ross, as above set forth, were made before the bill was presented to the defendants for acceptance. The bill was delivered to Clerk & Ross, army agents in Edinburgh, being persons then employed by the plaintiff to procure for him by purchase the commission of ensign above referred to. The bill, with those indorsements upon it, was afterwards presented to the defendants for acceptance, and accepted by them in the usual course of their business as bankers. It was afterwards indorsed and negotiated by the other persons whose names appear as indorsers, and finally with the Bank of England, who discounted it. At the expiration of the forty-five days specified in the bill as originally drawn, and the days of grace, the defendants paid the contents to the Bank of England, who presented it to them for payment. The plaintiff, at the time of drawing the bill, paid the full value for the same to Sir William Forbes, J. Hunter & Co., the drawers, but did not ask or obtain their consent, or that of the defendants, the acceptors, to make any alteration in the tenor of the bill by indorsement, either as to the condition of the payment or the extension of time. The plaintiff's name had never appeared in the "Gazette" as ensign in any regiment of the line. The question for the opinion of the court was whether the plaintiff was entitled to recover. If he was, the verdict was to stand: if he was not entitled to recover, a verdict was to be entered for the defendants.

This case was argued by *Lens*, Serjt., for the plaintiff, who contended that it was competent for the plaintiff by this special indorsement to make only a conditional transfer of the absolute interest in the bill, which he had purchased for a full consideration, and had vested in him by the delivery of the drawer. The defendants, by subsequently accepting the bill, had become parties to that conditional transfer; and, as the condition had never been performed, the transfer was defeated, and they became liable, after the expiration of the two months, to pay the plaintiff, to whom the property then reverted, the contents of the bill, of which none of the indorsers could enforce payment against the defendants at the forty-five days' end, because they had all received the bill subject to the condition, and were bound thereby. He cited *Ancher v. Bank of England*.

Shepherd, Serjt., for the defendant, contended that it was immaterial whether the acceptance was before or after the conditional indorsement. The acceptance admitted the handwriting of the drawer; but it did not mix itself with the conduct of the indorsers: it admitted nothing which was on the back of the bill. The whole practice of the courts was accordingly; for, in an action against the acceptor, it be-

came unnecessary to prove the handwriting of the drawer; but it was necessary to prove the handwriting of the indorser.

*The court gave judgment for the plaintiff*¹

TREUTTEL AND WURTZ v. BARANDON AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 27, 1817.

[Reported in 8 Taunton, 100.]

TROVER to recover the value of two bills of exchange: one drawn by Garton upon and accepted by Speare, payable to Garton's order eight months after date, and indorsed, "Pay to J. P. De Roure, Esq., or order, for account of Messrs. Treuttel & Wurtz;" the other drawn by Creswick upon and accepted by Speare, payable to Creswick's order, nine months after date, with a similar indorsement. At the trial of the case before Gibbs, C. J., at the London sittings after last term, it appeared that the bills had been deposited with the defendants by De Roure & Co., the agents of the plaintiffs, but without their authority, as a security for cash advances made by the defendants to De Roure & Co. De Roure, who had become bankrupt, stated that he received the bills for the plaintiffs, whose agent he was, and indorsed them to the defendants, to whom he gave them as a security on his own account; that, when the bills were deposited, he was indebted to the defendants beyond the amount of such bills; and that the defendants continued afterwards to advance money to him on the bills so deposited. It further appeared that, when De Roure received the bills on behalf of the plaintiffs, he wrote a letter of information to them, placed the bills to their credit in account, and continued to have transactions with the plaintiffs after that time. Speare, the acceptor, had failed, and his effects were in the hands of trustees.

On behalf of the defendants, it was urged that the action was not maintainable. Because, though an agent or factor cannot pledge the goods of his principal, he may pledge bills of exchange indorsed to him as a receiver for his principal, provided there be nothing in the indorsement to restrict the negotiability; secondly, because there was nothing restrictive in this indorsement, for the words, "Pay to J. P. De Roure, Esq., or order, for account of Messrs. Treuttel & Wurtz," were only inserted to show that, when the bills were paid, they should be carried in the books of the acceptor Speare, who had become insolvent, to the account of the plaintiffs, for the purpose of preventing confusion in

¹ See *Johnson v. Barrow*, 12 La. An. 83; *Wardell v. Hughes*, 3 Wend. 418. — Ed.

Speare's accounts. Gibbs, C. J., was of opinion that De Roure had no right to indorse these bills to a stranger, that he had no right to deposit them, that their negotiability was restricted, and that the defendants might well have collected from the special indorsement that the bills were not the property of De Roure. The jury found a verdict for the plaintiffs.

Copley, Serjt., on a former day having obtained a rule *nisi* to set aside this verdict and enter a nonsuit, being now called upon by the court, supported his rule. These bills were negotiable; they might have been discounted; and, if they might have been discounted, they had been properly dealt with. These bills were in the hands of De Roure, who was not restricted from sending them into the market for the purposes of trade. In *Evans v. Cramlington*, the defendant drew a bill on Rider payable to Price, or order, for the use of Calvert. Price indorsed the bill to the plaintiff. Rider dishonored the bill. It was held that the plaintiff had a right to recover, Price having a right of transfer, and having indorsed it to him. In the present case, the indorsement makes the bill payable to De Roure "for account of Treuttel & Wurtz." There is no dissimilarity between the cases; and De Roure had a right to indorse the bill to the defendants. If it be admitted that these bills might be discounted, why may they not be deposited as a security? What is the nature of this deposit? De Roure has a running account with the plaintiffs, paying and receiving money for them: this money he applies to the general purposes of business, and enters it in his accounts, as received for the use of those for whom he is agent. What difference is there between discounting the bills severally and crediting the principal with the proceeds of each, and entering the whole amount to their credit? If the negotiability of these bills be conceded, it follows that this case falls within the principles laid down in *Collins v. Martin*; for the ground on which it was there held that agents might pledge, for their own private purposes, bills of exchange in distinction from other property, was that the bills of exchange were negotiable. The special indorsement could not mean that De Roure should not negotiate them: it never could be intended that the plaintiffs should actually possess them, for that firm could not have sued upon them, and, indeed, they are left for months in the hands of De Roure after his letter of advice to them. The legal property of this bill was in De Roure; it was indorsed to him, or order, and was negotiable: he has indorsed it to the defendants, and therefore they are entitled to hold it.

DALLAS, J. It is not necessary in this case to dispute the soundness of the decision in *Collins v. Martin*; for, without doubt, if one deposit with his banker negotiable bills, and that banker afterwards deposit

them with a third person, as a pledge for his own debt, the property in such bills will pass to the pledgee. But this is not a simple case of a bill indorsed; but De Roure, the agent of the plaintiffs, being indebted to the defendants, deposits with them these bills, which were, by the indorsement, made payable to him "for the account" of his principals. The defendants take from De Roure these bills as a deposit, expressly by way of security, and not by way of discount; and the question is whether they did not take this deposit with sufficient notice that the bills did not belong to him. I am of opinion that the defendants had sufficient notice that these bills were not his property; and I, therefore, think that the plaintiffs are entitled to recover.

PARK, J. If our decision in this case broke in on the case of *Collins v. Martin*, I should hesitate before I gave my opinion. But the case is reduced to a single point; namely, whether the defendants had not knowledge when De Roure pledged these bills that they were the property of the plaintiffs. Of that I think there can be no doubt; and therefore I am of opinion that there is no ground for disturbing this verdict.

BURROUGH, J. There is a wide difference between bills of exchange discounted and bills of exchange deposited. If the bills had been discounted, and the money received, the amount would have been immediately entered into the account; but, deposited as they were, had they failed, their amount would have been struck out. The bills, therefore, did not form a real item in the account.

Rule discharged.

GILL v. CUBITT AND OTHERS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1824.

[*Reported in 3 Barnewall & Cresswell, 466.*]

DECLARATION by the plaintiff as indorsee of a bill of exchange, bearing date the 19th of August, 1823, drawn by one R. Evered, and accepted by the defendants. Plea, general issue. At the trial, before Abbott, C. J., at the London sittings after Hilary term, 1824, the plaintiff proved the handwriting of the acceptors and indorser. The defendant then proved that on the 20th of August a letter containing the bill in question and two others was enclosed in a parcel and delivered at the Green Man & Still coach-office, and booked for Birmingham. The parcel arrived at Birmingham by the coach, but the letter containing the bills had been opened, and the bills taken out of it.

On the following day, the drawer advertised the loss of the bills in two newspapers. The plaintiff, who was a bill-broker in London, then proved by his nephew, who assisted him in his business, that the bill was brought to his office between the hours of nine and ten on the morning of the 21st of August, by a person having a respectable appearance, and whose features were familiar to the witness, but whose name was unknown to him. He desired that the bill might be discounted for him, but the witness at first declined so to do, because the acceptors were not known to him. The person who brought the bill then said that a few days before he had brought other bills to the office, and that, if inquiry was made, it would be found that the parties whose names were on this bill were highly respectable. He then quitted the office and left the bill, and upon inquiry the witness was satisfied with the names of the acceptors. The stranger returned after a lapse of two hours, and indorsed the bill in the name of Charles Taylor, and received the full value for it, the usual discount and a commission of two shillings being deducted. The witness did not inquire the name of the person who brought the bill or his address, or whether he brought it on his own account or otherwise, or how he came by the bill. It was the practice in the plaintiff's office not to make any inquiries about the drawer or other parties to a bill, provided the acceptor was good. Upon this evidence, the Lord Chief Justice told the jury that there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, secondly, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought that he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant. Then the Lord Chief Justice, after stating the evidence and commenting upon the practice in the plaintiff's office of discounting bills for any persons whose features were known to him, but whose names and abode were unknown, without asking any questions, asked the jury what they would think if a board were affixed over an office with this notice, "Bills discounted for persons whose features are known, and no questions asked." The jury having found a verdict for the defendants, a rule *nisi* for a new trial was obtained in Easter term last, upon the ground that the plaintiff having paid a valuable consideration for the bill was entitled to recover its value; and, secondly, that the case had been put too strongly to the jury, when it was compared to the case of a public notice given by a broker that he would discount all bills without asking questions.

Scarlett and *Parke* now showed cause. Where a bill or note has

been acquired by theft, and afterwards comes to the possession of a holder for valuable consideration, it is incumbent upon him when he brings an action, not only to show that he paid that consideration, but also that he used due diligence to ascertain, before he took the bill or note, whether the party bringing it to him came by it honestly. Unless he does this, he cannot be said to have taken it *bona fide*, although he may have paid the full value for it. It is true that in *Lawson v. Weston* Lord Kenyon was of opinion that it was sufficient for a person who discounted such a bill to show that he paid value for it, but the propriety of that decision has always been doubted. If it is to be laid down as a rule that a party in possession of a stolen bill or note may obtain the value of it without being subjected to any inquiry, it will give a great facility to the disposal of property so acquired, and operate as an encouragement to fraud and theft. It is desirable that the rule laid down should have the effect of preventing parties, who are either guilty or cognizant of such fraud, from profiting by it. Then, if that be the correct rule upon the subject, the Lord Chief Justice was well warranted in the observations he made to the jury, and their verdict is supported by the evidence. The plaintiff took the bill from a person whose features were known to him, but of whom he knew nothing else, and made no inquiry as to how he came by the bill; and it was in evidence that he always conducted his business in this mode. Surely that is like the case of a person giving a public notice, "Bills discounted for persons whose features are known, and no questions asked."

Gurney and F. Pollock, contra. A party who has paid the full value for a bill which has been lost or stolen is entitled to recover the amount from the acceptor. The circulation of negotiable paper would be greatly impeded if it were laid down as a rule that a party discounting a bill was bound to investigate the title of the person from whom he receives it. In the case of *Lawson v. Weston*, the plaintiffs, who were bankers, had discounted the bill in the usual course of their business for a person who brought it to their shop, but who was unknown to them. It was contended by the defendant that, although a person might pay a bill, to which he was a party, to one who had come dishonestly by it, by reason of the personal liability attached to his name on the bill, a banker or any other should not discount a bill for a person unknown without using due diligence to inquire into the circumstances, as well respecting the bill as of the person who offered to discount it. But Lord Kenyon said that to adopt the principle of the defence to the full extent stated would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been ma-

terial, if they could bring knowledge of that fact home to the plaintiffs. They might or might not have seen the advertisement; and it would be going great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount, it would apply as well to a bill for £10 as for £10,000." In that case, therefore, the very point now raised was made and overruled by Lord Kenyon; and, although the bill was of the amount of £500, the parties acquiesced in that decision. The principle acted upon in that case had been previously adopted in *Miller v. Race*, *Grant v. Vaughan*, and *Peacock v. Rhodes*. At all events, the case was put too strongly to the jury by my Lord Chief Justice. It was not like the case of a public notice, that all bills would be discounted for persons whose features were known, and no questions would be asked. That mode of putting it excited an undue prejudice against the plaintiff, and the case ought to be submitted to a second jury.

ABBOTT, C. J. If we thought that, upon reconsideration of the evidence, another jury ought to come to a different conclusion, we would send the case down to another trial. But, being of opinion that the proper conclusion has been drawn from the evidence, we think that this rule ought to be discharged. I agree with the counsel for the plaintiff, that this case is hardly distinguishable from *Lawson v. Weston*. If there is any distinction, it is that in this case the plaintiff's clerk said it was not usual with the plaintiff to ask any questions, or to make any inquiry if bills were brought to them by persons whose features they supposed themselves to be acquainted with, provided they were satisfied with the names of the acceptors. I cannot help thinking that, if Lord Kenyon had anticipated the consequences which had followed from the rule laid down by him in *Lawson v. Weston*, he would have paused before he pronounced that decision. Since the decision of that case, the practice of robbing stage-coaches and other conveyances of securities of this kind has been very considerable. I cannot forbear thinking that that practice has received encouragement by the rule laid down in *Lawson v. Weston*, by which a facility has been given to the disposal of stolen property of this description. I should be sorry if I were to say any thing, sitting in the seat of judgment, that either might have the effect or reasonably be supposed to have the effect of impeding the commerce of the country by preventing the due and easy circulation of paper. But I am decidedly of opinion that no injury will be done to the interests of commerce, by a decision that the plaintiff cannot recover in this action. It appears to me to be for the interest of commerce that no person should take a security of this kind from another without using reasonable caution. If he take such security from the person whom he knows, and whom he can find out,

no complaint can be made of him. In that case, he has done all any person could do. But if it is to be laid down as the law of the land that a person may take a security of this kind from a man of whom he knows nothing, and of whom he makes no inquiry at all, it appears to me that such a decision would be more injurious to commerce than convenient for it, by reason of the encouragement it would afford to the purloining, stealing, and defrauding persons of securities of this sort. The interest of commerce requires that *bona fide* and real holders of bills, known to be such by those with whom they are dealing, should have no difficulties thrown in their way in parting with them. But it is not for the interest of commerce that any individual should be enabled to dispose of bill or notes without being subject to inquiry. I think the sooner it is known that the case of *Lawson v. Weston* is doubted, at least by this court, the better. I wish doubts had been cast on that case at an earlier time. If that had been done, this plaintiff probably would not have suffered. Coming to the facts of this case, they are these: that the young man, acting according to the course which the plaintiff when he was present followed, gave money for this bill to a person of whom, though he supposed he knew him, he really knew nothing. This is done at a very early hour, between nine and ten in the morning on the day after the bill was lost. I cannot help saying that that practice, in the plaintiff's business of a bill-broker, is a practice inconvenient for the reasons I have already given. It seems to me that it is a great encouragement to fraud, and it is the duty of the court to lay down such rules as will tend to prevent fraud and robbery, and not give encouragement to them. For these reasons, notwithstanding all the unfeigned reverence I feel for every thing that fell from Lord Kenyon, by whom *Lawson v. Weston* was decided, I cannot think the view taken by that learned lord at that time was a correct one; and, that being so, I am of opinion that this rule ought to be discharged.

BAYLEY, J. I agree that the way in which my Lord Chief Justice put this case for the consideration of the jury, by asking what would be the case if a man were to put over his shop, "Bills discounted for strangers, if they have good names on them, without any questions being asked," was a very strong way of putting the case for their consideration. But I think it was no more than the facts of this case warranted, and that he was putting as a general proposition that which exactly squared with the particular facts of this case. If a man commonly dealt in that way (and it appeared to be the plaintiff's habit as a broker), it would warrant such an advertisement as that which was described. If in general that was not the plaintiff's course and habit, then in this particular instance he deviated from his general

course. In this case, a party goes to a shop between nine and ten in the morning to get a bill discounted: the clerk does not know his name; he thinks he knows his features; he does not know where he lives; he knows nothing at all about him. The bill is left for two hours, and at the expiration of that time the party comes back again; and the clerk then has the opportunity of asking names, and whether he came on his own account, or from any and what house. No question of that description is put to him. Under these circumstances, I think it was the duty of my Lord Chief Justice to put it to the consideration of the jury whether there was due caution used by that party in that particular instance. If there was not due caution used, the plaintiff has not discounted this bill in the usual and ordinary course of business, or in that way in which business properly and rightly conducted would have required. But it is said that the question usually submitted for the consideration of the jury in cases of this description, up to the period of time at which my Lord Chief Justice's direction was given, has been whether the bill was taken *bona fide* and whether a valuable consideration was given for it. I admit that has been generally the case; but I consider it was parcel of the *bona fides* whether the plaintiff had asked all those questions which, in the ordinary and proper manner in which trade is conducted, a party ought to ask. I think, from the manner in which my Lord Chief Justice presented this case to the consideration of the jury, he put it as being part and parcel of the *bona fides*; and it has been so put in former cases. In the case of *Miller v. Race*, Lord Mansfield says: "Here an innkeeper took the note *bona fide* in his business from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber. For this matter was strictly inquired and examined into at the trial; and is so stated in the case, that he took it for a full and valuable consideration, in the usual course of business. Indeed, if there had been any collusion or any circumstance of unfair dealing, the case had been much otherwise. Now, the question which my Lord Chief Justice has put to the consideration of the jury, whether a party uses due caution or not, is, in other words, putting to them whether he took it in the usual course of business; for the course of business must require, in the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interest of trade. The next case, in order of time, is *Grant v. Vaughan*. Mr. Justice Wilmott there says: "The note appears to have been taken by him fairly and *bona fide* in the course of trade, and even with the greatest caution. He made inquiry about it, and then gave the change for it; and there is not the least imputation or pretence of suspicion that he had any notice of its being

a lost note." That learned judge did not consider the question of *bona fides* to be merely whether the note was taken by a party without having any real suspicion in his own mind, but whether he had taken it in the usual course of trade, and with caution. In *Peacock v. Rhodes*, a shopkeeper at Scarborough took from a perfect stranger a bill of exchange. The latter bought certain goods in the way of the plaintiff's trade. Lord Mansfield says: "The question of *mala fides* was for the consideration of the jury. The circumstance that the buyers and the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and therefore the case is clear." Then, if in that case those were questions fit for the consideration of a jury, as part and parcel of the question of *bona fides*, is it not also a fit and proper question for their consideration (when the point to be decided is whether a man has acted *bona fide* or not) whether he has inquired with that degree of caution which, in the ordinary course of trade, a prudent trader ought to use. That was the question propounded by my Lord Chief Justice in his direction to the jury; and they have exercised their judgment on it. I think the question was a fit question for their decision, and I think their decision was one with which we are not at liberty to quarrel. On the contrary, it appears to me to be material for the interests of trade to lay down as a rule that a party cannot in law be considered to act *bona fide*, or with due caution and due diligence, if he takes a bill of exchange from a person whose features alone he knows, without knowing what his name is, where he lives, or whether he is a person with whom he has been in the habit of trading. If we were to say that in this instance there had been due caution, it would certainly be giving a great facility to the disposal of bills of exchange which have been lost or stolen, by persons who have found or dishonestly obtained them. For these reasons, it appears to me that my Lord Chief Justice took the right view of this case, that it was consistent with the doctrine laid down in former cases, and that the decision of the jury was warranted by the evidence.

HOLROYD, J. I think the rule was correctly laid down to the jury by my Lord Chief Justice, and that there is no ground for granting a new trial. A party who discounts a bill which has been stolen is bound to show, not only that a good consideration was really and *bona fide* given for the bill (although that of itself would tend to the establishing of the other point requisite for him to show), but he must also make it appear to the satisfaction of a jury that he actually took it *bona fide*. If he takes it with a view to profit arising from interest

or commission, under circumstances affording reasonable ground of suspicion, without inquiring whether the party of whom he takes it came by it honestly or not, or if he takes it merely because it is drawn upon a good acceptor, then he takes it at a risk (or what ought, in the contemplation of a reasonable man, to be a risk), whether the bill be stolen or not: he takes it at his peril. I cannot agree with the doctrine laid down in *Lawson v. Weston*. The question whether a bill or note has been taken *bona fide* involves in it the question whether it has been taken with due caution. It is a question of fact for the jury, under all the circumstances of the case, whether a bill has been taken *bona fide* or not, and whether due and reasonable caution has been used by the person taking it. And if a bill be drawn upon parties of respectability capable of answering it, and another person discounts it merely because the acceptance is good, without using due caution and without inquiring how the holder came by it, I think that the law will not, under such circumstances, assist the parties so taking the bill in recovering the money. If the bill be taken without using due means to ascertain that it has been honestly come by, the party so taking on himself the risk for gain must take the consequence if it should turn out that it was not honestly acquired by the person of whom he received it. Here the person in possession of the bill was a perfect stranger to the plaintiff, and he discounted it, and made no inquiry of whom the bill had been obtained or to whom he was to apply if the bill should not be taken up by the acceptor. I think those circumstances tend strongly to show that the party who discounted the bill did not choose to make inquiry, but supposing the questions might not be satisfactorily answered, rather than refuse to take the bill, took the risk, in order to get the profit arising from commission and interest. I am therefore of opinion that the direction of my Lord Chief Justice to the jury was correct in point of law, that they had drawn the proper conclusion, and that there is no ground for granting a new trial.

*Rule discharged.*¹

¹ *Down v. Halling*, 4 B. & C. 330; *Snow v. Leatham*, 2 C. & P. 314; *Snow v. Peacock*, 3 Bing. 406; *Slater v. West*, Dans. & L. 15; *Strange v. Wigney*, 6 Bing. 677; *Easley v. Crockford*, 10 Bing. 243; *Haynes v. Foster*, 2 Cr. & M. 237; *Cunliffe v. Booth*, 3 B. N. C. 828; *Vairin v. Hobson*, 8 La. 50; *Nicholson v. Patton*, 13 La. 213; *Lapice v. Clifton*, 17 La. 152; *Marsh v. Small*, 3 La. An. 402; *Smith v. Mechanics' Bank*, 6 La. An. 610; (but see *Wilcox v. Beal*, 3 La. An. 404); *Nutter v. Stover*, 48 Me. 163; *Hunt v. Sandford*, 6 Yerg. 387; *Ryland v. Brown*, 2 Head, 270; *Merritt v. Duncan*, 7 Heisk. 156; *Sandford v. Norton*, 14 Vt. 228 (*semble*); *Roth v. Colvin*, 32 Vt. 125; *Gould v. Stevens*, 43 Vt. 125, *accord*.

See *Cochran v. Stewart*, 21 Minn. 435. — Ed.

LLOYD AND OTHERS *v.* SIGOURNEY.

IN THE EXCHEQUER CHAMBER, MAY 13, 1829.

[Reported in 5 Bingham, 525.]

ASSUMPSIT for money had and received by the defendants to the use of the plaintiff. Plea: the general issue. The cause was tried before Lord Tenterden, at Guildhall, when a verdict was found for the plaintiff for £3,164 11s. 8d., subject to the opinion of the court, upon a case of which the following is the substance:—

The plaintiff was a merchant at Boston, in the United States of America: the defendants were bankers in London. One Samuel Williams was a customer of the defendants. He carried on the business of an American agent, and in that character received from the plaintiff a bill of exchange upon a London house for £3,164 11s. 8d., indorsed by the plaintiffs in the following words: "Pay to Samuel Williams, Esq., of London, or his order, *for my use*. Henry Sigourney." The defendants were in the habit of discounting for Williams; and on the 22d of October, 1825, they discounted for him the bill in question. In the morning of that day, the balance in his favor exceeded the amount of this bill. In the course of the morning, he indorsed this, with other bills, to the defendants, to the amount of £7,081.

They discounted *bona fide*, giving him credit for the amount, short by the discount only. By five o'clock of that day, they paid his drafts and acceptances to the amount of upwards of £10,000. On the 24th of October, Williams stopped payment, and subsequently became a bankrupt. The bill in question was paid by the acceptors, and the amount received by the defendants.

The question for the opinion of the court was whether, under the circumstances, the plaintiff was entitled to recover from the defendants the amount of the bill in question. If he was, the verdict was to stand: if not, a nonsuit was to be entered.¹

Patteson, for the defendants below. The general rule is that an indorsement transfers to the indorsee all the rights of the indorser,

¹ Judgment being rendered for the plaintiff in the King's Bench, the special case was turned into a special verdict, and the cause was then carried by a writ of error to the Exchequer Chamber. The facts, as set forth in the special case in 7 L. J. K. B. 73, have been substituted for the special verdict given in the report by Bingham. — Ed.

and among others the right of transferring the interest in the bill by indorsement. *More v. Manning*, *Acheson v. Fountain*,¹ *Edie v. East India Company*. In the latter case, Wilmot, J., even intimated a doubt whether there could be a restrictive indorsement. But, conceding that there may, the question is whether the indorsement in this case contains clear negative words restraining the negotiability of the bill. The words must be construed most strongly against the plaintiff below, the party using them. First, the bill is indorsed payable to order. *Prima facie*, therefore, it was transferable. The legal title was in Williams, though, as between the plaintiff below and him, he might be bound to hold the bill for the use of the plaintiff below; and, if Williams had the legal title, he might transfer his interest in the bill by indorsement. In *Snee v. Prescott*,² the language of the bill was, "Pay to *my use* and order," — not "pay A. B., to my use." The meaning of such an indorsement was considered in *Evans v. Cramlington*.³

¹ 1 Str. 557.² 1 Atk. 247.

³ "This was a special action on the case brought upon a bill of exchange, which was thus: The defendant, Cramlington, drew a bill of exchange for £500 upon one Rider, payable at twenty-five days' sight to one Price, or order, for the use of one Calvert. Price indorsed this bill to the plaintiff, Evans, which was accepted by Rider; but he did not pay the money on the day; and thereupon the plaintiff, Evans, who was the indorsee, brought this action against Cramlington, the drawer.

The defendant, Cramlington (after oyer of the bill), pleaded that Calvert (who was named the *cestui que use* in the bill) was an officer in the excise, and indebted to the king in such a sum, and that, upon an exchequer process, at the suit of the king, this £500 was extended in his hands.

And, upon a demurrer to this plea, there were two points made: —

1. Whether, by the words of the bill, Calvert had such an interest in the money that, before it was paid to Price, or order, it might be extended as the proper goods of Calvert for his debt due to the king; or whether he had only an equitable right to receive and have the money after it was paid to Price.

2. Whether Price had such an interest in the money by the words of this bill that he might lawfully indorse and assign it to another by the custom of merchants; or whether he had only a bare authority to receive it for the use of Calvert.

And afterwards, in Easter term, 1 Will., it was adjudged by the Chief Justice Holt and the court for the plaintiff, because Calvert had only an equitable interest, and not a lawful one, to have the money; for he could not maintain an action on this bill against Rider.

Besides, the indorsement of it by Price to Evans (the plaintiff) was for value received of the plaintiff by Price; and so he received that very money to which Calvert had an equity, and therefore he was responsible in equity to him; but the sum demanded by the plaintiff, Evans, is not that sum, but another due to him for value received, in which sum Calvert was not concerned; and for these reasons the money now in demand was not extendible, and therefore this plea was adjudged ill.

Afterwards, the defendant brought a writ of error in the Exchequer Chamber upon this judgment; and in Easter term, 2 Will., &c., the judgment was affirmed." Carth. 5. — Ed.

In the case, as reported in Shower, p. 4, Lord Holt says: "This is a bill which is assignable by Price; and when Price assigned it he received the money, and that receipt was for the use of Calvert; and there Calvert hath his action: but we can take notice of none but Price; and at this rate the credit of bills of exchange will be spoiled." If Calvert's consent had been necessary, that must have been stated in the pleadings to have been given; but there is no such averment. The pleadings are set out in Ventris, p. 308. That case, therefore, is an authority to show that Williams had authority to transfer the interest in the bill in this case. The words "to my use" may be construed as a direction from the plaintiff to Williams, his agent, to apply the bill, or the proceeds of it, to his, the plaintiff's, use. The other construction makes the indorsement restrictive. But the intention is not clear; and it ought to be so, in order to restrain the negotiability of the bill. If the first construction be adopted, the defendants below clearly were not bound to see to the application of the money. If the words of the indorsement had been, "which place to my account," or "which hold to my use," the defendants below would not have been bound to look to the application of the money. The party to whom a bill is tendered is not bound to make any inquiry. According to the argument on the other side, every subsequent indorsee would be a trustee for the plaintiff below. That would be very inconvenient. In *Evans v. Cramlington*, Lord Holt says that when Price assigned the bill, and received the money, he became trustee for Calvert. If that be so, then Williams, by indorsing for value to Lloyd, became trustee for the plaintiff below. He could not make the defendants below trustees for the plaintiff below. The reasonable construction of the indorsement is that it was a direction by the principal to his selected agent to apply the proceeds to his use. If there were any fraud or other suspicious circumstances, the case might have been different. *Treuttel v. Baranlon* proceeded on that ground. And in *Roberts v. Kensington* the sum mentioned in the bill was only to be paid in a certain event specified in the indorsement, of which the acceptors had notice, as they did not accept till after the indorsement. The defendants below applied the money generally, according to the direction of Williams. They could not know in what mode Williams was to apply the money to the use of the plaintiff below. This was a *bona fide* discount, in the way of trade, to Williams himself. The defendants below were not trustees for the plaintiff below.

F. Pollock, for the plaintiff below. The bill belonged to the plaintiff below; and he is entitled to recover its amount from the defendants. The indorsement was special, so as to prevent the indorsee from transferring any interest in the bill beyond the particular purpose or

the particular individual mentioned in the indorsement. The earliest case where such a special indorsement is mentioned is *Snee v. Prescott*. There Lord Hardwicke says: "Promissory notes and bills of exchange are frequently indorsed in this manner: Pray pay the money to my use, in order to prevent their being filled up with such an indorsement as passes the interest." In *Edie v. The East India Company*, Wilmot, J., speaking of an indorser, says: "To be sure, he may give a mere naked authority to a person to receive it for him. He may write upon it, 'Pray pay the money to my servant, for my use,' or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him, and for his own use. In such case, it would be clear that no valuable consideration had been paid him; but, at least, that intention must appear upon the face of the indorsement." It appears, therefore, from these two authorities, that an indorsement in the form used in the present case will prevent the indorsee from passing the interest in the bill by a subsequent indorsement. The general indorsement of a bill makes it the legal property of the indorsee, and gives him the *jus disponendi*; but an indorsement for the use of another is notice that the property in the bill is in that other, and that the holder is an agent for him; and cannot transfer the bill. *Evans v. Cramlington* only decided that the drawer of a bill, in favor of A. to the use of B., could not, when sued by C., to whom it had been indorsed by A., set up as a defence the rights of B. as a *jus tertii*.

BEST, C. J. We are all of opinion that the judgment of the Court of King's Bench must be affirmed. Whoever reads the indorsement on this bill of exchange must perceive that its operation is limited, and that the object of the indorser was to prevent the money received in respect of the bill from being applied to the use of any other person than himself: to whomsoever the money might be paid, it would be paid in trust for the indorser; and into whose hands soever the bill travelled, it carried that trust on the face of it. And we see no inconvenience to commercial interests from such a limitation of the effect of the indorsement so expressed. The only result will be to make parties open their eyes, and read before they discount.

It is impossible to read this indorsement without seeing that some inquiry is necessary; for, if such be not the use of the words introduced, they are of no use. But, if a use can be found for them, the courts must apply them in the way in which they were intended to operate.

The indorser has added the words "or order" to the name of the indorsee, because, if he had not done so, the indorsee must have attended in person to obtain payment of the bill; and the short way

to obviate that inconvenience was to introduce the words "or order." But he still intended that the person ordered by the indorsee to receive the amount should receive it to the use of him, the indorser.

But the defendants below, instead of paying the amount of the bill for the use of Sigourney, the indorser, have discounted it for the use of Williams, the indorsee. We are all, therefore, of opinion that the judgment of the Court of King's Bench must be *Affirmed*.¹

CROOK v. JADIS.

IN THE KING'S BENCH, JANUARY 13, 1834.

[Reported in 5 *Barnewall & Adolphus*, 909.]

ASSUMPSIT by the plaintiff as indorsee against the defendant as the drawer of a bill of exchange, dated May 23, 1831, for £1,000, accepted by Lord Fole, and payable eleven months after date. Plea, general issue. At the trial before Denman, C. J., at the Middlesex sittings after last Michaelmas term, the defence was that the bill, as between the drawer and acceptor, was a mere accommodation bill, and had been issued by the defendant to a bill-broker to get discounted; and that the latter had fraudulently, and without any authority, sold it to one Howard, for whom the plaintiff discounted it. On the evidence, it was contended that the plaintiff had not used due caution, and that he had taken the bill under circumstances which ought to have excited the suspicion of a prudent man; that the bill had not been fairly obtained, and therefore he was not entitled to recover. Lord Denman, C. J., told the jury to find for the plaintiff, if they thought he had not been guilty of gross negligence in taking the bill under the circumstances given in evidence. A verdict having been found for the plaintiff,

¹ *Snee v. Prescott*, 1 Atk. 245, 249; *Sweeny v. Easter*, 1 Wall. 166; *Brown v. Jackson*, 1 Wash. C. C. 512; *Lee v. Chillicothe Bank*, 1 Bond, 387; *Leary v. Blanchard*, 48 Me. 269; *Wilson v. Holmes*, 5 Mass. 543; *Rock Co. Bank v. Hollister*, 21 Minn. 385; *Third Bank v. Clark*, 23 Minn. 263; *Blaine v. Bourne*, 11 R. I. —; *Power v. Finnie*, 4 Call, 411, *accord*.

The insertion of the words "executor," "administrator," "trustee," "assignee," "agent," "guardian," or "sheriff," after the name of the payee or indorsee in a bill or note, does not restrict the transfer of the instrument. *Supra*, 389 n. 1, 391 n. 1; *Fountain v. Anderson*, 33 Ga. 372; *Walter v. Kirk*, 14 Ill. 55; *Downer v. Read*, 17 Minn. 493; *Thornton v. Rankin*, 19 Mo. 193; *Powell v. Morrison*, 35 Mo. 244; *Fletcher v. Schaumburg*, 41 Mo. 501.

But see *Nicholson v. Chapman*, 1 La. An. 222; *DeGoer v. Kellar*, 2 La. An. 496; *Nicholson v. Jacobs*, 2 La. An. 666; *McMasters v. Dunbar*, 2 La. An. 577; *Holmes v. Carnan* Freem. Ch. (Miss.) 408.

Sir James Scarlett now moved for a new trial on the ground that the true question which ought to have been submitted to the jury was whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent man. *Down v. Halling*.¹

DENMAN, C. J. I used the expression "gross negligence" advisedly, because I thought nothing less ought to have prevented the plaintiff from recovering on the bill.

LITTLEDALE, J. There must be gross negligence, at least in a case like the present, to deprive a party of his right to recover on a bill of exchange.

TAUNTON, J. I think the case was properly submitted to the jury. I cannot estimate the degree of care which a prudent man should take. The question put by the Lord Chief Justice, whether the plaintiff was guilty of gross negligence, was more definite and appropriate.

PATTESON, J. I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man.

*Rule refused.*²

GOODMAN v. HARVEY AND OTHERS.

IN THE KING'S BENCH, APRIL 28, 1836.

[Reported in 4 *Adolphus & Ellis*, 870.]

ASSUMPSIT on a bill of exchange drawn by defendants, Sept. 1, 1832, at Limerick, upon Gould, Dowie, & Co. (London), for £262 13s. 1d., value in freight per *Cicero*, payable at four months to John Scott or order, indorsed by Scott to David Levy, and by D. Levy to plaintiff. The first count alleged non-acceptance; the second, non-payment. Plea (before the new rules), *non assumpsit*. On the trial before Lord Denman, C. J., at the sittings in London, after Hilary term, 1835, the following facts appeared. The bill was given by the defendants, merchants at Limerick, to Scott, a ship-owner, for a balance of freight. Scott gave it to Hudson, a ship's captain (who gave no value, and whose name did not appear on the bill), to get it discounted. Hudson delivered the bill for that purpose to David Levy, who caused it to be presented for acceptance on September 20th. The

¹ 4 B. & C. 330.

² *Backhouse v. Harrison*, 5 B. & Ad. 1098, *accord*.

See *Foster v. Pearson*, 1 C. M. & R. 855; *Bartrum v. Caddy*, 9 A. & E. 280. — ED.

drawees refused acceptance, in consequence of having received from the defendants a notice, sent to the latter by a solicitor, warning them not to pay any money to Scott, or to any other person on his account, as the party giving the notice was about forthwith to sue out a commission of bankrupt against him, on the petition of certain persons named in the notice.¹ The drawees gave this communication (the receipt of which was proved at the trial) as their reason for not accepting. The bill was noted for non-acceptance, and protested. No notice of the non-acceptance was given to the defendants. Levy returned the bill to Hudson, who, in the latter part of October, carried it back to Scott. Scott, who had by that time been arrested for debt, gave the bill to Hudson again, in order that he might once more endeavor to raise money by discounting it; and Hudson undertook to do so. Hudson again placed the bill in the hands of Levy; and he got it discounted by the plaintiff, who paid about £260 upon it. Levy never remitted the proceeds, but, as was represented at the trial, retained them in fraud of Scott; and no value was ever given for the bill by either Levy or Hudson. When the bill became due, the plaintiff presented it for payment, which Gould, Dowie, & Co. refused, although they had funds, the right to the proceeds being contested. They were furnished with funds a day or two before the bill became due, but had not funds at the time of the non-acceptance. The bill was protested for non-payment; and notice of the non-payment was sent to the defendants by letter, stating that the bill had been protested as last mentioned, but not enclosing a copy of the protest. For the defendants, it was objected, first, that the letter ought to have contained a copy of the protest, which objection the Lord Chief Justice overruled; and, secondly, that the plaintiff, in taking the bill from Levy with the notarial marks upon it, had been guilty of gross negligence, and therefore took the bill with all its vices, and could have no better right to recover upon it than Levy himself, who clearly would have had none. The Lord Chief Justice was of this opinion, and observed that the plaintiff had received the bill with the death-wound apparent on it; and he proposed to the plaintiff's counsel either a nonsuit, or that the case should go to the jury on the question whether or not the plaintiff had been guilty of gross negligence. The jury, in answer to a question from the Lord Chief Justice, said that, in their opinion, the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance. A nonsuit was then taken; and in the next term Erle moved for a new trial, on the ground that the above ruling against the plain-

¹ The commission did afterwards issue, on a fiat dated Jan. 15, 1833, and this action was understood to be defended by Scott's assignees.

tiff was incorrect ; that the bill had been lawfully sent into the market by Scott, while not yet due ; and that the plaintiff, who had taken it before maturity, and given value for it, had a right to recover the amount, notwithstanding any defect in the title of an intermediate party. A rule *nisi* was granted.

Sir John Campbell, Attorney-General, and *Mellor*, now showed cause. Independently of the objection which prevailed, the plaintiff ought not to have recovered, first, because the defendants had no proper notice of the refusal to accept. A holder, knowing that the bill has been dishonored by non-acceptance, is bound to give notice of it to the drawer, as admitted by all the judges in *O'Keefe v. Dunn*. Here the notarial marks afforded such knowledge to any holder. The object of the notice to the drawer is that, if he has funds in the hands of the drawee, he may remove them ; and here the defendants had funds in the hands of Gould, Dowie, & Co. before the bill became due. Secondly, no regular notice of the non-payment was given, because the letter communicating that fact did not furnish any copy of the protest. This was a foreign bill, being drawn in Ireland. *Mahoney v. Ashlin*.¹ And where the indorsee of a bill, drawn in the West Indies, payable in London at sixty days' sight, noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote to the drawer in the West Indies, acquainting him that the bill was not accepted, it was held that the indorsee, "by not sending the protest for non-acceptance," had "made himself liable." *Goostrey v. Mead*.² Where notice, without a copy of the protest, has been held sufficient, the party receiving the notice was resident in England at the time. [PATTESON, J., referred to *Cromwell v. Hynson*,³ and LORD DENMAN, C. J., to *Robins v. Gibson*.⁴] The observation as to residence applies to the latter case, if not to both ; and, in the first, the reasons of Lord Kenyon's ruling are not stated. In *Chaters v. Bell*,⁵ where it was held that, if a foreign bill were regularly presented and noted, protest might be made at any time before action brought, the court, after argument, recommended a special verdict, but the recommendation was never acted upon. [COLERIDGE, J. A very good book, after stating the decisions in *Cromwell v. Hynson*³ and *Goostrey v. Mead*,² observes⁶ of the latter, "The only way in which this case can be reconciled with Lord Kenyon's decision is by considering the expressions used in the latter case, 'not sending protest,' as meaning nothing more than 'not giving notice of the non-acceptance.'"] Then, as to the other point, the plaintiff, although he gave value for the

¹ 2 B. & Ad. 478.

⁴ 1 M. & S. 288.

² Bull. N. P. 271.

⁵ 4 Esp. 48.

³ 2 Esp. 511.

⁶ 1 Selw. N. P. (8th ed.) 337.

bill, was not entitled to recover: in the first place, because he took the bill after it had been noted for non-acceptance, and no distinction is to be drawn between a bill noted for non-acceptance and one dishonored by non-payment, *per* Bayley, J., in *Crossley v. Ham*. He took it, therefore, subject to all infirmities which would have attended it in the hands of Hudson; and Hudson could not have recovered upon it, having given no value. Secondly, even if the plaintiff had taken the bill without notice of dishonor, yet, as it had been indorsed in fraud of the proprietor Scott, the plaintiff could only have recovered on showing that he was a *bona fide* holder for value. Now, although it can no longer be maintained as law that the holder of a bill is disabled from recovering it if he has taken it under circumstances which might reasonably have awakened suspicion, the present is a case of gross negligence; and such negligence has so far the effect of fraud that the holder who has been guilty of it can have no better title than the party from whom he takes.

Erle, contra. The first point was not taken at the trial; and the facts proved showed that the notice could not be necessary. Secondly, assuming it to be requisite that notice should be given of protest as well as non-payment, it is sufficient if the letter communicating the non-payment states that there has been a protest. In *Bayley on Bills* (p. 259, 5th ed.), speaking of protest and notice of dishonor in the case of a foreign bill, the author merely says, "In some cases a copy, or some other memorial of it" (the protest), "should accompany the notice." [LORD DENMAN, C. J. We have no doubt that the notice here was sufficient.] Then, thirdly, as to the plaintiff's title as holder. No objection is made to it, except that his taking the bill with the notarial marks on it is supposed to show gross negligence. In *O'Keefe v. Dunn*, it was held that the indorsee of a bill which, in the hands of his indorser, had been refused acceptance, no notice of such refusal having been given to the drawers, might nevertheless recover upon the bill, provided he took the indorsement without knowledge of the previous dishonor. Here, if the plaintiff knew of the dishonor, the distinction taken in that case might, under ordinary circumstances, be available against him. But that distinction is important only where notice to the drawer was necessary in the first instance. Here it was not; for it must be implied, from the communication made to Gould, Dowie, & Co. by the defendants, that the non-acceptance was within their knowledge. Then, notwithstanding the notarial marks, the bill was as if it had never been presented for acceptance. [LITLEDAL, J. As far as regards notice.] Scott, then, had a good cause of action against the defendants after the non-acceptance, and might transfer that right to his indorsee. Any ground of complaint as between Scott

and the parties to whom he had transferred it before it reached the plaintiff cannot affect the plaintiff's right. The only question is whether the plaintiff acted *bona fide* in discounting it. (He was then stopped by the court.)

LORD DENMAN, C. J. The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith. The rule must be absolute.

LITLEDAL, PATTESON, and COLERIDGE, JJ., concurred.

*Rule absolute.*¹

¹ Uther v. Rich, 10 A. & E. 784; Arbouin v. Anderson, 1 Q. B. 498; *Ex parte* Bushell, 3 Mont. D. & D. 658; May v. Chapman, 16 M. & W. 355; Bank of Bengal v. Fagan, 7 Moo. P. C. 72; Raphael v. Bank of England, 17 C. B. 161; Carlon v. Ireland, 5 E. & B. 765; Oakeley v. Ooddeen, 2 F. & F. 656; Dailey v. De Fries, 11 W. R. 376; Jones v. Gordon, 2 App. Cas. 616; 26 W. R. 172, s. c. *accord*.

In May v. Chapman, *supra*, Parke, B., said, p. 361: "I agree that 'notice and knowledge' means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes." In Jones v. Gordon, 26 W. R., *supra*, the rule was thus stated by Lord Blackburn, p. 174: "I think, however, it is now settled that, if value is given for a bill, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong when there were circumstances which might have led to such a suspicion. All these are matters which tend to show that there was dishonesty in not doing it; but they do not in themselves furnish a defence to an action on a bill of exchange. I take it that it is necessary to show whether in the case of a party who is solvent and *sui juris*, or as against the estate of a bankrupt, that the person who gave value (whether great or small) for the bill was affected with notice that there was something wrong about it when he took it; but he need not have had notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should think that, perhaps, the holder had stolen it, when in truth the latter had obtained it by false pretences, I think he would be taking it at his peril. But such evidence of carelessness or blindness might, with other evidence, be good evidence upon the question, which appears to me to be the real one, whether he knew that there was something wrong in the bill. If he was (so to speak) honestly blundering and careless, he would not be disentitled to recover; but if it appeared that he must have had a suspicion of something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his secret mind, 'I suspect there is something wrong, and if I ask questions it will be no longer suspecting, but knowing, and then I shall be unable to recover,' I think that is dishonesty."

It is hardly necessary to add that the *bona fides* of a purchaser under the law-merchant differs in no respect from the *bona fides* of a purchaser in equity. See *Jones v. Smith*, 1 Hare, 56, where Wigram, V. C., stated the doctrine of notice as follows: "If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply; then the purchaser will, in equity, be considered, as in fact he is, a *bona fide* purchaser, without notice. This is clearly Sir Edward Sugden's opinion; and, with that sanction, I have no hesitation in saying it is mine also."

The doctrine of *Goodman v. Harvey* obtains generally in the United States. *Goodman v. Simonds*, 20 How. 343; *Pittsburgh Bank v. Neal*, 22 How. 96; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. Nat. Banks*, 21 Wall. 354; *Collins v. Gilbert*, 94 U. S. 753; *Brown v. Spofford*, 17 Alb. L. J. 31; *Ex parte Estabrook*, 2 Lowell, 547; *Schoen v. Houghton*, 50 Cal. 528; *Brush v. Scribner*, 11 Conn. 395; *Craft's Appeal*, 42 Conn. 146; *Matthews v. Poythress*, 4 Ga. 287; *Comstock v. Hannah*, 76 Ill. 530; *Shreeves v. Allen*, 79 Ill. 553; *Murray v. Beckwith*, 81 Ill. 43; *Spitler v. James*, 32 Ind. 202, 208; *Gage v. Sharp*, 24 Iowa, 15, 19; *Lake v. Reed*, 29 Iowa, 258; *Woolfolk v. Bank of America*, 10 Bush, 504; *Smith v. Harlow*, 64 Me. 510 (*semble*); *Ellicott v. Martin*, 6 Md. 509; *Commercial Bank v. Nat. Bank*, 30 Md. 11; *Maitland v. Citizens' Bank*, 40 Md. 540; *Worcester Bank v. Dorchester Bank*, 10 Cush. 488; *Spooner v. Holmes*, 102 Mass. 503, 508; *Smith v. Livingston*, 111 Mass. 342; *Miller v. Finley*, 26 Mich. 249; *Howry v. Eppinger*, 34 Mich. 29; *Horton v. Bayne*, 52 Mo. 531; *Merrick v. Phillips*, 58 Mo. 436; *Hamilton v. Marks*, 63 Mo. 167; *Kittle v. DeLamater*, 3 Neb. 325; *Crosby v. Grant*, 36 N. H. 273; *Merriam v. Rockwood*, 47 N. H. 81; *Hamilton v. Vought*, 34 N. J. 187; *Hall v. Wilson*, 16 Barb. 548; *Steinhart v. Boker*, 34 Barb. 436; *Lord v. Wilkinson*, 56 Barb. 593; *Magee v. Badger*, 34 N. Y. 247; *Belmont Bank v. Hoge*, 35 N. Y. 65; *Welch v. Sage*, 47 N. Y. 143; *Seybel v. Nat. Bank*, 54 N. Y. 288; *Chapman v. Rose*, 56 N. Y. 137; *Dutchess Co. v. Hachfield*, 1 Hun, 675; *Johnson v. Way*, 27 Oh. St. 374; *Phelan v. Moss*, 67 Pa. 59; *State Bank v. McCoy*, 69 Pa. 204; *Moorehead v. Gilmore*, 77 Pa. 118; *Greeneaux v. Wheeler*, 6 Tex. 515; *Davis v. Miller*, 14 Gratt. 5 (*semble*).

The decisions and *dicta* in the following cases are overruled. *Hall v. Hale*, 8 Conn. 336; *Russell v. Haddock*, 8 Ill. 233 (*semble*); *Sturges v. Nat. Bank*, 49 Ill. 220; *Sims v. Bice*, 67 Ill. 88; *Adkins v. Blake*, 2 J. J. Marsh. 40; *Ayer v. Hutchins*, 4 Mass. 370 (*semble*); *Cone v. Baldwin*, 12 Pick. 545 (*semble*); *Hamilton v. Marks*, 52 Mo. 78; *Greer v. Yosti*, 56 Mo. 307; *Buckner v. Jones*, 1 Mo. App. 538; *Wiggin v. Bush*, 12 Johns. 306 (*semble*); *Brown v. Taber*, 5 Wend. 566; *Pringle v. Phillips*, 5 Sandf. 157; *Holbrook v. Mix*, 1 E. D. Sm. 154; *Danforth v. Dart*, 4 Duer, 101; *Williamson v. Brown*, 15 N. Y. 354; *McKesson v. Stanberry*, 3 Oh. St. 156 (*semble*); *Bassett v. Avery*, 15 Oh. St. 299 (*semble*); *Beltzhoover v. Blackstock*, 3 Watts, 20 (*semble*); *Dickson v. Primrose*, 2 Miles, 366 (*semble*). — ED.

AWDE v. WILLIAM DIXON.

IN THE EXCHEQUER, JUNE 23, 1851.

[Reported in 6 Exchequer Reports, 869.]

ASSUMPSIT by payee against maker of a promissory note.

Pleas: first, *non fecit*; secondly, that the promissory note was the note of the defendant and Richard Dixon; that the defendant subscribed the note as maker, and delivered it to Richard Dixon, for the accommodation of Richard Dixon, and on the terms only that the note should be subscribed by one Robinson as a joint maker with the defendant and Richard Dixon, and that Richard Dixon should not deliver the note to any person without Robinson having first signed the same as maker; that, before the note was delivered to the plaintiff, Robinson refused to sign the note; that Richard Dixon delivered the note to the plaintiff without Robinson having signed the same, whereof the plaintiff had notice. Verification.

The plaintiff joined issue on the first plea, and to the second replied *de injuria*.

At the trial before Cresswell, J., at the last York spring assizes, it appeared that the defendant's brother, Richard Dixon, being desirous of borrowing £100 on the security of a promissory note, applied to the defendant to become one of his sureties, which he agreed to do, on the representation of his brother that one Robinson would become his co-surety, and that the defendant should not be responsible unless Robinson joined in the note. On the faith of this representation, the defendant signed the following blank instrument, leaving a space for Robinson's as the first signature:—

“ —, December, 1848.

“ On demand, we do hereby jointly and severally promise to pay to Mr. —, or order, £100, as witness our hands.

“ WILLIAM DIXON.”

Robinson refused to sign the instrument, and Richard Dixon took it in its imperfect state to the plaintiff; and, upon R. Dixon's representation that he had authority to deal with it, the plaintiff advanced him money upon it, and the blanks were filled up by inserting “26” before “December,” and the plaintiff's name as payee. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

A rule *nisi* having been obtained accordingly,

Atherton and *Wallis* showed cause. Under the circumstances, Richard Dixon had authority to bind the defendant, by completing the instrument and delivering it to a *bona fide* holder for value. Where a person intrusted with a negotiable instrument for a special purpose, delivers it to another, the mere contravention of the trust will not prevent the latter from recovering, if a *bona fide* holder for value and without notice. [PARKE, B. This is a false instrument.] The defendant, by putting his name to an imperfect instrument, undertook to be answerable for it when filled up in the shape of a note. The case is not distinguishable from that of a blank acceptance delivered to a person for a special purpose. [PARKE, B. Suppose Richard Dixon had authority to fill up the instrument with £100, and he inserted £200, would the defendant be liable? In the case of *Rex v. Hart*,¹ all the judges were unanimously of opinion that where a blank acceptance is delivered to a person, with authority to fill it up with a particular sum, and he inserts a larger sum, he is guilty of forgery. *Regina v. Wilson*² is an authority to the same effect.] A *bona fide* holder for value, and without notice, is not disabled from recovering by reason of the fraud of the person from whom he received the note. *Bramah v. Roberts*.³ [PARKE, B. That was the case of a complete bill placed in the hands of a third person for a special purpose. ALDERSON, B. Here the making of the bill is tainted.] The defendant having, with full knowledge of the circumstances, allowed the imperfect instrument to remain in his brother's hands, he impliedly gave him authority to obtain money upon it. [ALDERSON, B. A blank acceptance is not of itself an authority to make a complete bill, but only evidence of authority. *Molloy v. Delves*.⁴ Here the defendant signed his name to a piece of paper, giving his brother authority to make it a promissory note on certain terms; he makes it a note on other terms: then how does that differ from the case of signing his brother's name? It would be strange if this transaction amounted to forgery, and yet we should hold this a true instrument.] A person who has given value for an imperfect instrument cannot be said to have forged it by inserting his own name as payee. [PARKE, B. Here the authority was countermanded.] Where a person signed his name to a blank paper duly stamped, and delivered it to another for the purpose of drawing a bill of exchange in such manner as the latter should think fit, and he drew a bill payable to a fictitious payee or order, and indorsed it for valuable consideration, it was held that the indorsee might sue the person who signed it as drawer, or recover on a count stating

¹ 1 Moo. C. C. 486.

² 1 Den. C. C. 284.

³ 3 Bing. N. C. 963; 1 Scott, 350.

⁴ 7 Bing. 428.

the special circumstances. *Collis v. Emett*.¹ [PARKE, B. In that case, there was an unlimited power to draw in any way; here there was an incomplete instrument, which no person had authority to fill up. ALDERSON, B. Suppose the defendant had gone to his brother, and said, "I prohibit you from filling up that note," could that have made any difference?] *Cruchley v. Clarence* decided that a bill of exchange drawn and issued in blank for the name of the payee may be filled up by a *bona fide* holder with his own name.

Watson and *Hugh Hill* appeared in support of the rule, but were not called upon.

PARKE, B. It is unnecessary to say whether this instrument is a forgery or not, but there is certainly ground for contending that the making of it complete contrary to the directions of the defendant renders it a false instrument as against him. I do not gainsay the position that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. But this is a different case. Here the instrument, to which the defendant's name is attached, is delivered to his brother, with power to make it a complete instrument on one condition only; that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority, where, in case of a refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case; and, unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is, "*Nemo plus juris in alium transferre potest quam ipse habet*." It is a fallacy to say that the plaintiff is a *bona fide* holder for value: he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority; consequently, the instrument is void as against the defendant.

ALDERSON, B., and PLATT, B., concurred.

*Rule absolute.*²

¹ 1 H. Blac. 313

² *Townsend v. France*, 2 Houst. 441 (*semble*); *Jones v. Primm*, 6 Tex. 170 (*semble*), *contra*.

Where the signature of a party to a bill or note purports on the face of the instrument to have been placed there by an agent, the rights of a holder for value will depend upon the actual authority of the agent to sign for the ostensible principal.

The rule is thus stated by Byles, J., in *Stagg v. Elliott*, 12 C. B. n. s. 381: "The

HATCH v. SEARLES.

STANWAY'S CASE.

CONWAY'S CASE.

IN CHANCERY, BEFORE SIR JOHN STUART, V. C., FEBRUARY 8, 9, 22,
1854.

[*Reported in 2 Smale & Giffard, 147.*]

AN order to administer the estate of a testator, Isaac Searles, under the direction of the court, having been made, creditors and claimants upon the estate were, by advertisements, required to come in and prove their claims before the chief clerk. Mr. Stanway went in before the chief clerk, and sought to prove as a creditor upon a bill of exchange for £100, dated the 18th day of February, 1852, drawn by Mr. Curtis upon, and addressed to, Mr. Isaac Searles, the testator, as of "Old Kent Road," and accepted by the testator for £100, and payable two months after date, to the order of Mr. Curtis, and by him indorsed to a Mr. Wallis, and by him indorsed to Mr. Stanway.

Mr. Conway also sought to prove as a creditor on the estate upon a bill of exchange for £50, dated the 12th of February, 1852, drawn by Mr. Curtis upon, and addressed to, the testator as of "Old Kent Road," and accepted by the testator, and payable six months after date: this bill, having been indorsed by Mr. Curtis, was by him paid to Mr. Conway.

The chief clerk, upon the circumstances in evidence before him, disallowed both claims.

These cases now came on for argument by adjournment from Chambers, by way of motion, that the certificate of the chief clerk might be varied by allowing these claims.

words '*per procuration*' are an express statement that the party accepting the bill has only a special and limited authority, and therefore a person who takes a bill so accepted is bound at his peril to inquire into the nature and extent of the agent's authority. It is not enough to show that other bills, similarly accepted or indorsed, have been paid, although such evidence, if the acceptance were general, by an agent in the name of a principal, would be evidence of a general authority to accept in the name of the principal."

See to the same effect *Attwood v. Munnings*, 7 B. & C. 278; *Alexander v. McKenzie*, 6 C. B. 766; *Floyd Acceptances*, 7 Wall. 666; *La. Bank v. Orleans Co.*, 3 La. An. 294; *Nixon v. Palmer*, 4 Seld. 398; *Mech. Bank v. N. Y. R.R.*, 13 N. Y. 631; *Gould v. Sterling*, 23 N. Y. 439; *Claffin v. Farmers' Bank*, 25 N. Y. 293; *Pope v. Albion Bank*, 57 N. Y. 126; *Weeks v. Fox*, 3 Th. & C. 354; *Stainback v. Bank of Va.*, 11 Gratt. 269.

See *North Bank v. Aymar*, 3 Hill, 262. — ED.

The evidence upon these claims was conflicting, but the following are the facts as they appeared to the court:—

The testator, a young medical student, was on terms of intimacy with Mr. Curtis.

A few days before the testator left England for Demerara, Mr. Curtis being in want of money, the testator, in order to assist Mr. Curtis, at his request wrote his name across two blank pieces of paper, impressed as bills of exchange with a stamp, for 3*s.* 6*d.* each, and gave them to Mr. Curtis. It was a matter in dispute whether they were absolute gifts to Mr. Curtis, or merely authorities to use the testator's name for the accommodation of Curtis; and it was also in dispute whether Mr. Curtis was in any respect a creditor of the testator for sums paid for him. The testator left Southampton on the 17th of February, 1852, for Demerara, where he died on the 11th of April following. Mr. Curtis retained the two acceptances in his possession in blank until the 18th of April, 1852. On that day, he filled up the acceptance for £100, in the presence of Mr. Wallis and Mr. Stanway. Mr. Wallis discounted the bill for £100, not giving to Curtis the full cash for the amount less ordinary discount, but taking the amount into a running account between them, and making him some small advance on the transaction. Mr. Wallis discounted the bill with Mr. Stanway before it became due. On the 21st of April the bill became due, and was not paid. Under these circumstances, Mr. Stanway preferred the present claim to be admitted a creditor for the amount of the bill upon the testator's estate.

Mr. Curtis, in the month of April, 1852, discounted the bill for £50 with Mr. Conway. It did not appear whether Mr. Conway knew of the circumstances under which this acceptance had been given; but, not being satisfied with the bill, he took from Mr. Curtis a letter addressed to him by the testator, dated the 28th of October, 1851, as a document showing that the testator and Curtis were on such terms as to justify the latter in negotiating the bill.

It appeared that, although the testator was dead prior to the date when Curtis filled up the acceptances, the death of the testator was not known in England until after Mr. Stanway and Mr. Conway had discounted the bills. The address of the testator, as given in the bills, of "Old Kent Road," was the last address of the testator previous to his leaving England; but it was a mere lodging, and ceased on his leaving England to be his address.

Both motions now came on together.

Mr. *T. H. Terrell*, in support of Mr. Stanway's claim; and

Mr. *Huddleston*, in support of Mr. Conway's claim.

The gift of these two blank acceptances to Curtis was an authority to him to fill them up to any amount which the stamp impressed on

them would cover at any time. The right to fill up and negotiate was complete in Curtis from the time when the blank acceptances were given to him. *Tate v. Hibbert*.¹ In *Collis v. Emett*,² where an acceptor, having signed his name to a blank paper duly stamped, and having delivered it to B., who, having the acceptor's authority, drew a bill payable to a fictitious payee, or order, and indorsed it over to an indorsee for value, without notice, an action by the indorsee against the acceptor as upon a bill payable to the bearer was sustained. In *Russel v. Langstaffe*, after a very full discussion and consideration of the authorities, it was held that an indorsement written on a blank note or check will afterwards bind the indorser for any sum and time of payment which the person to whom he intrusts the note chooses to insert in it. In *Schultz v. Ashley*,³ the decision was the same. The observations of Chief Justice Tindal in that case are very applicable to the present. The same proposition is laid down very expressly in *Montague v. Perkins*; and this view of the law is confirmed by *Temple v. Pullen*.⁴ As soon as the acceptance was signed and given into the hands of Curtis, it became binding on the testator, and the authority was irrevocable.⁵ *The Queen v. Burch*,⁶ *Thornton v. Dick*,⁷ *Cox v. Troy*.

But it may be contended that as the bills were dated after the death of the acceptor, that affects their validity. It is not suggested that Curtis knew of the testator's death when he perfected the bills of exchange, and negotiated them: whatever he did was, in that respect, *bona fide*. That act had relation to the time when the acceptance was given, and the bills must be considered as having been perfected then. On the authority of *Snaith v. Mingay*,⁸ where the question being whether a bill of exchange was an Irish or an English instrument, it was held to have been an Irish instrument, because it was an instrument as of the date and place when and where it was signed and indorsed, though it was subsequently filled up and signed by the drawers in England.

*Usher v. Douncey*⁹ is in principle the same as the present cases. There a partner in a firm drew a bill of exchange in blank in the partnership name, payable to their order, and duly indorsed it, and gave it to a clerk to fill up and use for the partnership purposes, and died: the clerk filled up the bill of a date prior to the deceased partner's death, and negotiated it; and it was held that the surviving partners were liable as drawers of the bill to a *bona fide* indorsee for value, though no value for it had come to their hands. The only difference

¹ 2 Ves. Jr. 111.

⁴ 8 Exch. 389.

⁷ 4 Esp. 270.

² 1 H. Bla. 313.

⁵ See Bayley, Bills, 204.

⁸ 1 M. & Selw. 87.

³ 2 Bing. N. C. 544.

⁶ 1 Low. & W. B. C. 56.

⁹ 4 Camp. 97.

is that there a date prior to the death of the partner was inserted ; but, on the authority of *Snaith v. Mingay*, whatever date was inserted, the act has relation to the parting with the document by the party to be charged.

The claimants assume that it appears on the evidence that Mr. Curtis had an interest in the acceptance as well as an authority : in such case, it is clear from the principles which are established in the law of agency, irrespectively of the *lex mercatoria*, that it was competent for him to fill up the bills after the death of the acceptor. The reason for this is well stated in *Story on Agency*, p. 489 : it is this, — that the power given to an agent, coupled with an interest, is rather an agreement that the agent may transfer the property vested in him free from any equities of the principal, than strictly a power to transfer. Another reason for the authority continuing after the death of the plaintiff is that it can be done by and in the name of the agent. In *Wood v. Manley*¹ and *Wood v. Leadbitter*,² it was held that an authority coupled with an interest could not be revoked.

Mr. *Malins* and Mr. *Needham*, for the plaintiffs, in support of the chief clerk's certificate, were proceeding to submit, first, that the right of Curtis to fill up the bill extended to the lifetime of the acceptor only, and ceased on his death ; and, secondly, that the claimant must be a *bona fide* holder to entitle him to be a creditor on the estate.

HIS HONOR, however, stopped them, and said the impression on his mind was that the certificate was right, and that both claims must be disallowed ; but he would consider the authorities cited, and either give his decision to-morrow, or hear counsel for the respondents.

The VICE-CHANCELLOR now said : The claim of Mr. Stanway to be admitted as a creditor for £100 and interest, as the holder of a bill accepted by the testator, and the similar claim of Mr. Conway, as holder of an acceptance for £50, are supported and opposed upon evidence of such facts as leave no doubt upon my mind as to the way in which their claims should be disposed of. But, in the arguments in support of their claims, some propositions stated in the reported decisions of judges of the very highest authority have been relied upon, and used in a sense inconsistent with the established principles of the law of contract. In the case of *Russel v. Langstaffe*, Lord Mansfield laid it down as clear law that the indorsement in blank of a note is a letter of credit for an indefinite sum. Subsequent authorities have held the amount to be defined by the limits of the stamp. In the latest case quoted before me at the bar, *Montague v. Perkins*, the Lord Chief Justice Jervis stated the law in these terms : “ That the giving a

¹ 11 Ad. & E. 84.

² 13 M. & W. 853.

blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the term to which the stamp extends." The proposition is stated in similar terms in many other cases. But it is always so stated with reference to the rights of a *bona fide* holder for valuable consideration without notice. The general terms in which the proposition is stated must be read with reference to the facts of the cases to which it was applied. As an absolute general proposition it cannot be maintained. And, although in the passage quoted in the last case, from the judgment of Lord Chief Justice Jervis, it is stated in general terms and sounding as an absolute rule, yet the subsequent passages in the same judgment introduce proper qualifications, and say that giving a blank acceptance is only *prima facie* evidence of authority to fill up, and, being only *prima facie* evidence, may of course be rebutted by evidence of the real nature and extent of the authority, and of the true terms of the contract, and of the whole transaction between the person who signs in blank and the person to whom the blank acceptance is given.

Therefore the general proposition relied on in support of these motions does not absolutely govern, when the question is between the acceptor in blank and the person who receives it in blank from him, if the transaction between them is not supported by any valuable consideration. Independently of any other evidence of a contract between these two persons, the blank acceptance is an imperfect instrument, which in itself could create no contract, although *prima facie*, but only *prima facie*, it might imply some authority to one of the parties. As to a *bona fide* holder, the question as to the effect of the acceptance or indorsement having been written on a blank piece of paper can be of no importance, unless he is fastened with notice of that imperfection. If the holder has notice of the imperfection, he can be in no better situation than the person who took it in blank, as to any right against the acceptor or indorsee who gave it in blank. But, if he be a *bona fide* holder without notice, as he must have taken the negotiable instrument in a perfect shape, and in terms a complete contract, without any notice, or any circumstances of suspicion to call for inquiry, which would be equivalent to notice, the law in favor of the rights of a *bona fide* holder of the negotiable instrument, apparently perfect as a contract, will not permit the acceptor to annul the effect of his own act upon evidence of a transaction to which the holder was not privy, and which may contradict the terms of the written contract to which the *bona fide* holder was justified in giving credit.

In the case of Mr. Stanway, which I have now to dispose of, the evidence entirely excludes the application of the proposition much insisted upon. Mr. Stanway had full notice that the acceptance had

been given in blank, and was therefore an imperfect instrument as between the late Mr. Searles, the acceptor, and Mr. Curtis, to whom it was given in blank. Mr. Stanway was himself present at filling up the blanks; and, being thus fastened with notice of the transaction between Mr. Searles, the acceptor in blank, and Mr. Curtis, he acquired against the acceptor no better right than Mr. Curtis, who gave no value for the acceptance. The transaction between Curtis and Stanway was one in which they each acted as principals; and upon that transaction the contracting parties were Curtis, Stanway, and Wallis, who, as they all had notice of the imperfection of the contract as to the acceptor, could obtain no further right against him than Curtis had.

As to the case of Mr. Conway, he is so far from being a *bona fide* holder without notice, that, instead of taking the £50 acceptance in the ordinary course of business, he did not rely on the bill, but fortified his title by taking along with it a letter written by Searles, in October, 1851, as evidence of Curtis's title to the bill. Relying not on the title conferred by the bill itself as a negotiable instrument in the hands of Curtis, but requiring evidence of his title, and being deceived by the representation and defective evidence given to him by Curtis, his remedy must be against Curtis, with whom alone, upon the evidence, he can be held to have made any contract.

As to the case of both claimants being holders with notice, they are bound by the fraudulent misrepresentations on the face of both bills as to the residence of the acceptor Searles, who, having left the country to reside in Demerara, where he died, is described as living in the Old Kent Road.

These views of the infirmity of the title on both bills leave untouched the argument as to the revocation of the implied authority given to Curtis by the blank acceptance. If Curtis had given any valuable consideration to Searles, there would have been room for the argument, that the authority, being coupled with an interest, was not revoked by the death of Searles. But there was no such valuable consideration. The mere possession of the blank acceptances by Curtis did not give him such a beneficial interest in them as to prevent a revocation by the death of Searles.

I must therefore hold that neither of these claimants is a creditor of the testator Searles, and must refuse the motion with costs.¹

¹ *Ledwich v. McKim*, 53 N. Y. 307, *accord*.

Huntington v. Branch Bank, 3 Ala. 186; *Johns v. Harrison*, 20 Ind. 317 (*semble*); *Joseph v. Nat. Bank*, 17 Kas. 256 (*semble*); *Bank of Commonwealth v. Curry*, 2 Dana, 142; *Fanning v. Farmers' Bank*, 16 Miss. 139 (*semble*); *Chemung Bank v. Bradner*, 44 N. Y. 680, 689 (*semble*); *Fullerton v. Sturges*, 4 Oh. St. 529, *contra*.

See *Norwich Bank v. Hyde*, 13 Conn. 279; *Henderson v. Bondurant*, 39 Mo. 369. — *ED.*

DAWSON v. PRINCE.

IN CHANCERY, BEFORE SIR JAMES LEWIS KNIGHT BRUCE AND SIR
GEORGE JAMES TURNER, L. JJ., NOVEMBER 24, 25, DECEMBER
13, 1857.

[*Reported in 2 DeGex & Jones, 41.*]

THIS was an appeal by the defendant Daniel Prince from a decree of the Master of the Rolls restraining him from suing on a bill of exchange, on the ground that it was part of the separate estate of the plaintiff Charlotte Dawson, a married woman, that it had been negotiated without her consent, and that the defendant took it with notice.

The plaintiff and her husband the defendant Joseph Dawson were married in Australia, in July, 1854, on which occasion a settlement was made of part of her property, by which the income was secured to her separate use. The husband and wife shortly afterwards came to England.

In May, 1856, one of the trustees of the settlement sent from Australia to Mrs. Dawson a bill of exchange for £196, drawn on the Bank of Australasia in London, and made payable "to the order of Mrs. Charlotte Dawson," thirty days after sight. This bill was a remittance on account of the income of the settled fund, and was sent in a letter addressed to Mrs. Dawson, to the care of the defendant Prince, which arrived in August, 1856. Mr. Dawson received the letter, left the bill at the Bank of Australasia for acceptance, and on 20th August brought it, accepted by the bank, to Prince at his office, and asked him to get it discounted. Prince observed that it was payable to Mrs. Dawson. Dawson replied that it was, and that she had indorsed it. The bill in fact bore indorsed upon it a signature purporting to be Mrs. Dawson's. Prince thereupon said: "Put your name upon it, and I will get you the money." He knew that the payee was the wife of Mr. Dawson, but did not know her handwriting; he did not ask whether her signature was genuine, but upon Dawson's indorsing the bill took it to the bankers of Messrs. Overend & Gurney, and had it discounted. The bankers, upon taking the bill, required Prince to indorse it, which he accordingly did, and having received the money handed it to Dawson, who retained it for his own purposes, and shortly afterwards deserted the plaintiff.

The bill at the time when it was discounted had twenty-six days to run; and Mrs. Dawson, before it became payable, served a notice on the bank, stating that her signature was forged. The bank thereupon refused to pay till the rights of the parties were determined. Overend

& Gurney therefore had recourse to Prince, and he paid them. Mrs. Dawson then filed a bill against Prince, Dawson, and the bank, alleging that she had never indorsed the bill, and that her husband had disposed of it without her authority, consent, or knowledge, and praying that she might be declared entitled to it, that the bank might be ordered to pay her, and that Prince might be restrained from suing at law on the bill.

When the cause came on for hearing before the Master of the Rolls, the evidence of Mrs. Dawson, verifying the allegations of the bill, was uncontradicted. Mr. Prince, on his cross-examination, deposed as follows as to what passed when he took the bill from Dawson: "Her name was then upon it. I never had seen her at that time, and I did not know her handwriting. I made no inquiries whether it was her handwriting or not; for I never doubted it, as her husband brought the bill, and she had indorsed it. If I had known that her indorsement was not her handwriting, I should not have procured the bill to be discounted, nor should I have done so if her name had not been on it. It would not have been regular."

The Master of the Rolls held that the fact of the bill being payable to the order of a married woman was notice of her title, and that Prince must therefore be held affected by notice that it was her separate estate. His Honor further held that a forged signature could not give Prince any rights against Mrs. Dawson, and he granted a perpetual injunction against any proceedings being taken at law on the bill.

Mr. Prince appealed; and, it having been seen on the production of the bill at the hearing that Mrs. Dawson's signature upon it was extremely like other signatures of hers which were indisputably genuine, he adduced the evidence of two persons skilled in making *fac-similes* of handwriting, who deposed with confidence, from the comparison of this signature with other undisputed signatures, that it was genuine. This evidence was read *de bene esse* on the hearing of the appeal; and Mrs. Dawson, with her own consent, was examined *viva voce* in court.

Mr. Speed and *Mr. Villiers*, for the plaintiff.

We submit that the Master of the Rolls was right in holding that the form of the bill was notice that it related to the separate estate of Mrs. Dawson. No doubt a bill might be made in this form without relating to separate estate, but it is highly improbable that it would be; and the reasonable presumption is that a bill thus drawn is separate property. No doubt, the husband's indorsement passed the legal interest, but the equitable title could be acquired only by an assignment from Mrs. Dawson, and a forged indorsement from her is a mere nullity.

Prince cannot be treated as a purchaser for value: he was rather an agent to get the bill discounted.

Mr. Follett and Mr. C. T. Simpson, for Prince.

Prince must be looked upon as a purchaser for value. He made himself liable to Overend & Gurney on the bill, and, having paid them, he at all events takes their rights. The cases in which it has been held that the husband's indorsement passes the legal title to a bill of this nature show that the view of the Master of the Rolls as to the form of the bill being notice of separate use is not according to the common understanding of mankind with respect to commercial instruments. *Mason v. Morgan*, *Barlow v. Bishop*. Bills are often drawn in favor of married women without relation to separate estate. That a bill is so drawn may afford room for conjecture that it is separate estate, but does not, as we submit, give constructive notice that it is. See the principles as to constructive notice in *Jones v. Smith*,¹ *West v. Reid*.² The doctrine of constructive notice is not to be extended. *Ware v. Lord Egremont*.³

But suppose Prince had notice that the bill was separate estate, we submit that he did all that it was incumbent on him to do, and that there is no equity to affect his legal rights. There was nothing in the circumstances of the case to excite suspicion, and he took the bill *bona fide*, in the belief, and relying on the husband's representation, that she had indorsed it. Under these circumstances, he was not bound to inquire further. *Jones v. Smith*,¹ *Hewitt v. Loosemore*.⁴ In *Jones v. Powles*,⁵ the equitable title was deduced through a forged instrument; but the purchaser, there being nothing to lead him to suspicion of the forgery, was held entitled to protect himself by a legal estate which he had got in. That case governs the present, and is approved by Lord St. Leonards in *Bowen v. Evans*.⁶

Mr. Cotton, for the Bank of Australasia.

Mr. Speed, in reply.

No title can be acquired under a forged indorsement. *Esdaille v. La Nauze*.⁷ Every one who takes a negotiable instrument knows that he must look to the genuineness of the indorsement, and it could easily have been ascertained whether this was genuine. In the cases cited on the other side, all that could reasonably be required was done, not so here.

Judgment reserved.

THE LORD JUSTICE KNIGHT BRUCE. In this cause, the plaintiff Mrs. Dawson, a married lady suing by a next friend, claims for her

¹ 1 Hare, 43; 1 Phill. 244.

² 4 DeG., M. & G. 460, 473.

³ 3 M. & K. 581.

⁴ 1 Y. & C. Exch. 394.

⁵ 2 Hare, 249, 257.

⁶ 9 Hare, 449.

⁷ 1 Jo. & Lat. 178, 264.

separate use the possession and benefit of a bill of exchange for £196, which is in the hands of the defendant Mr. Prince as indorsee and legal holder. It is overdue, the acceptors however being ready to pay the amount to the holder, unless prevented by the interposition of the court in favor of the plaintiff, whose title, if any, is of course equitable merely, that of the holder, the defendant Mr. Prince, being, as I have said, good at law. There is no dispute except between him and the plaintiff, who is the payee of the bill, on the back of which her name "Charlotte Dawson" is written as the signature of an indorser, a signature said by her to be forged. With this signature (whether forged or not forged) upon it, and the signature upon it also (a signature certainly genuine) of her husband as an indorser, it came into the possession of Mr. Prince as an indorsee for value before its maturity, and he insists that he is entitled to recover at law on the instrument against the acceptors for his own benefit.

The Master of the Rolls, on the materials before him, came, as I understand, to the conclusion that the alleged indorsement by the plaintiff of the bill of exchange was not genuine, and was written without her authority, consent, or knowledge; that, as between herself and her husband at least, he had no right to deal with the instrument, and that she had a good title to the benefit of it for her separate use, a title available against the present holder.

Before us evidence in addition to that which existed in the suit at the time of the Rolls hearing was tendered, for the purpose of proving the genuineness of the disputed signature, and *de bene esse*, but not otherwise received. I doubted and still doubt whether it could or can, in the circumstances of the case, be right to admit it absolutely. That point, however, I think unimportant upon the question whether we ought to grant or refuse relief to the plaintiff, who was examined *viva voce* before us, with her consent, upon the request of the counsel of the defendant Mr. Prince, and they are both entitled to have that examination considered as part of the testimony in the suit. Whether upon all the materials before us (considered either as including or as not including the evidence received *de bene esse*), it is or would be a correct conclusion to hold that the plaintiff neither indorsed the bill nor gave permission to her husband to deal with it as he did, I am not sure. But, as the case appears to me, we can do no injustice by assuming, for the purpose of the question whether the plaintiff is entitled to relief against Mr. Prince in the present suit; and accordingly, for that purpose, I assume that the bill of exchange was remitted to this country as part, and did form part, of the plaintiff's separate property, and was not indorsed by her; that Mr. Joseph Dawson, her husband, dealt with it without her consent, and that as against her he had no

equitable right, no equitable power, to deal with it. But can her equitable claim, though valid against him, prevail against the present legal title to the bill and to the benefit of it, — a legal title which, having under his indorsement been unquestionably acquired by the defendant Mr. Prince, is now clearly vested in that gentleman, — vested in him for valuable consideration, — I say for valuable consideration, inasmuch as before the maturity of the bill he indorsed it, in the character, as between himself and Mr. Joseph Dawson, of surety for Joseph Dawson, and became as indorser liable to pay the amount of the bill, at or after its maturity, to Messrs. Overend, Gurney, & Co., who before its maturity discounted it, and at or after its maturity received the amount of it from Mr. Prince, who on the occasion of the discounting, and therefore before the maturity, had handed to Joseph Dawson the sum paid by the discounters; and it appears to me that, however good and effectual the alleged equitable title of the plaintiff would have been if Mr. Prince had not indorsed and paid as he did indorse and pay, it must, in the actual circumstances, give way to his legal title, inasmuch as, in my opinion, neither before nor when he indorsed the bill, nor before nor when he paid to Joseph Dawson the money received from Messrs. Overend, Gurney, & Co., had Mr. Prince knowledge, information, or notice of any facts or fact of such a nature as to render it incumbent on him, as between himself and the plaintiff, to apply to her or make more inquiry or investigation than he did make. Whether the circumstance that the plaintiff was the payee of the bill, coupled with the fact that when and before Mr. Prince had any thing to do with it he was aware, according to the truth, that the plaintiff was the wife of Joseph Dawson, and had been so at and before the time of the drawing of the bill, amounted or did not amount to notice, actual or constructive, to Mr. Prince that the bill was drawn on account of separate estate of hers, or was her separate property, or represented any money or property belonging to her for her separate use, I think it unnecessary to give and I do not give any opinion. Certainly, however, I am not satisfied that Mr. Prince, before or when he parted with money paid by him to Joseph Dawson, knew in fact, believed in fact, or suspected in fact, that the plaintiff had any interest in the bill for her separate use. Mr. Prince certainly thought that in point of regularity, if not of necessity, the bill required indorsement by the payee, though a married woman; but he was told by her husband that she had indorsed it, and her signature (whether forged or not forged) was, I repeat, on the back of the bill as that of an indorser. I think that Mr. Prince believed in the genuineness of that signature, and acted on that belief; nor can I consider him censurable for having entertained it. The signature had not, I conceive, a suspicious appearance to any

person not familiar, if to any person familiar, with her ordinary mode of writing her name; and I conceive that a reasonable man acting fairly might well have believed that the husband held and was dealing with the bill not without the knowledge of his wife, not without her consent, not wrongfully. It appears to me that for every purpose of the present claim and dispute Mr. Prince must be taken to have been entitled to rely on what Joseph Dawson said, and to consider him not without the equitable, as plainly he was not without the legal, right to dispose of the bill. That Mr. Prince meant to act honestly I am satisfied, and although probably, if the payee of the bill had not been Joseph Dawson's wife, Mr. Prince would, on the hypothesis of the signature "Charlotte Dawson" upon the bill of exchange being a forgery, have lost his money, I repeat that in my judgment, as the facts are, he must in the position of a defendant here prevail, and it seems to me accordingly that he ought to be dismissed from the suit. With regard to the costs of it, considering as I do that Mr. Prince was blameless in the transaction which produced the litigation, I think that the plaintiff's next friend must pay the costs from the beginning, except Mr. Prince's costs of the appeal: those Mr. Prince must, I conceive, bear himself.

THE LORD JUSTICE TURNER. This case is peculiar in its circumstances, but it seems to me to be governed by principles and authorities to which we are bound to give effect. Both upon principle and upon authority, I take it to be perfectly settled that as against a purchaser for valuable consideration without notice, having a legal title, this court will give no relief. It is not attempted to be denied that the defendant Prince has in this case a good legal title, and what we have to consider, therefore, is whether he is a purchaser for valuable consideration, and whether he can be affected with notice.

First, then, as to the question of notice. It has been said that the mere fact of a bill being made payable to a married woman is notice to all the world that the moneys payable upon the bill belong to the married woman for her separate use. For the purposes of this case, I assume this to be so, not intending, however, to intimate any opinion, much less to decide, that it ought to be so considered. I think that question immaterial to the present case, for this bill when it came to the hands of the defendant Prince purported to bear the indorsement of the plaintiff, and it is in evidence that before the defendant Prince proceeded to get the bill discounted he was told by the husband of the plaintiff that it had been indorsed by her. In my opinion, he was entitled to rely upon that representation, and was not bound to make further inquiry. I think so upon the authority of *Jones v. Smith* and *Ware v. Lord Egmont*, which were referred to in the argument before

us. It was said, indeed, that those cases were cases relating to real estate, and were not applicable to the case before us; but those cases rest upon a broad principle which does not depend upon the nature of the property in respect of which the question arises; and, besides, I think that it would be at least as dangerous to extend the doctrine of constructive notice in cases relating to commercial transactions as in cases relating to real estate. It was said, however, that the transaction in this case was not an ordinary commercial transaction, that it was a transaction out of the ordinary course of business; but it cannot be denied that there was here a dealing with an instrument of commerce by a person engaged in commercial transactions, and it cannot I think be said that a merchant or tradesman procuring a bill to be discounted for a person in the habit of resorting to the house of business in which he is engaged, as the husband of this lady appears to have been, is acting otherwise than in the ordinary course of business, at all events to such an extent as to induce any suspicion. I am of opinion, therefore, that the defendant Prince cannot in this case be affected with notice that this bill was not indorsed by the plaintiff, if in truth it was not so indorsed, on which I give no opinion.

It remains then only to consider whether the defendant Prince is to be deemed to be a purchaser for valuable consideration, and I am of opinion that he ought to be so considered. If this bill had been discounted by him, there could have been no question upon the point, and I think it can make no difference that he did not himself discount it; for it was by his indorsement that it was procured to be discounted, and by virtue of that indorsement he has been compelled to pay it. It was said for the plaintiff, that he was a mere agent in the transaction, but this is not so: so far as he was an agent at all, he was an agent who came under liability on account of his principal.

Upon the whole, therefore, my opinion is that this bill ought to have been dismissed, and I think that it should have been dismissed with costs; but, as the plaintiff has had the authority of the Master of the Rolls in her favor, I think there should be no costs of the appeal, except as to the bank, whose costs must be paid by the plaintiff.¹

¹ "Query, whether the fact of a bill being drawn in favor of a married woman be notice, actual or constructive, that it is part of her separate estate; this presumption is perhaps stronger since the passing of the Married Women's Property Act, 1870." Byles (11th ed.) 65. And see *Carver v. Carver*, 53 Ind. 241, where it was held that payment of a note of which a married woman was the holder, was made to her husband at the peril of the party paying to show his authority to receive payment. — ED.

BUCKLEY v. JACKSON.

IN THE EXCHEQUER, JANUARY 16, 1868.

[Reported in Law Reports, 3 Exchequer, 135.]

ACTION by the ultimate indorsee of a bill of exchange, drawn by defendant "for co-lessee and self," upon and accepted by the Glen Auldin Slate and Slab Quarry Company, Limited, and indorsed by the defendant in these words: "Pay J. Spittal, Esq., or order, value in account with H. C. Drinkwater, Esq. For self and co-lessee. J. S. Jackson."

The defendant pleaded, seventhly, that he indorsed the bill to Spittal at the request of Drinkwater, for the accommodation of Drinkwater, to give title to the bill as against the acceptors, and without any value or consideration for the drawing, indorsement, or payment of the bill by defendant; that Spittal indorsed in blank to Drinkwater without value, in order that Drinkwater might indorse the bill back to Spittal, as security for a promissory note of Drinkwater's, of which Spittal was holder; that Drinkwater did so indorse the bill back to Spittal, who then deposited it with his bankers, with the promissory note, for a special purpose, viz. that the bankers might as his agents hold the bill on his behalf as such security, and without any other value or consideration; that the bankers, contrary to the said purpose, and in fraud of the defendant, and of Spittal, and without their consent, handed the bill to Drinkwater, who, with notice of the premises, received the same in fraud of the defendant and of Spittal; that when the bill was indorsed to the plaintiff the same was overdue, and that plaintiff had notice of the premises, and it was indorsed to and held by him without value or consideration.

Eighthly, on equitable grounds, that, when the defendant indorsed the bill to Spittal, it was mutually agreed between them that the indorsement should be taken to be without recourse to defendant; that Drinkwater, when the bill was indorsed to him, had notice of the premises, and that there was no value or consideration for the indorsement to him, and he always held the bill without value or consideration; that the plaintiff, when the bill was indorsed to him, had notice of the premises, that the bill was then overdue, and that it was indorsed to and was held by him without value or consideration.

At the trial before Martin, B., at the Manchester winter assizes, 1867, the defendant proved that he indorsed the bill under the cir-

cumstances stated in the seventh and eighth pleas: on the other hand, the plaintiff proved that it was indorsed to him before it was due, for consideration, and without express notice; but it was contended for the defendant that his indorsement was restrictive, and gave notice to the plaintiff of the agreement under which he indorsed it. The learned judge ruled that the indorsement was not restrictive; and a verdict was taken for the plaintiff.

Higgin moved for a new trial on the ground of misdirection, and distinguished the case of *Stuart v. Murrow*,¹ on the ground that in that case not the restrictive indorser himself, but an antecedent indorser (the drawer of the bill) was sued.

[*KELLY*, C. B. Value in account means only value received in account, and is of the same effect in an indorsement as on the face of the bill. It expresses that value has been received, and received in a certain manner; but it in no way restricts the effect of the indorsement.]

Per Curiam. *KELLY*, C. B., *MARTIN*, and *PIGOTT*, BB.

*Rule refused.*²

¹ 8 Moo. P. C. 267.

² *Potts v. Reed*, 6 Esp. 57; *Murrow v. Stuart*, 8 Moo. P. C. 267, *accord.* — *Ed.*
See *Leland v. Parriott*, 35 Iowa, 454; *Adams v. Smith*, 35 Me. 324.

In *Murrow v. Stuart*, *supra*, the Supreme Court of Hong Kong, whose judgment was affirmed in the Privy Council, said, p. 269: "It was admitted, on the part of the plaintiff, that the indorsement was restrictive so far as to make a subsequent indorsee a mere trustee or agent for the Oriental Bank, but no further. On the other hand, it was contended for the defendant, upon the authority of *Bayley on Bills*, and *Byles on Bills*, that the restricted indorsee could convey no right of action whatever to a subsequent indorsee. . . . Having minutely examined the cases, I feel myself bound to adhere to the opinion I expressed at the time of the argument; that they do not support the position laid down by Justice Bayley and Serjeant Byles, that a restricted indorsee can convey no right of action to a subsequent indorsee. With but one exception, the question as to right of action has never so much as been raised in the cases brought forward. They have turned upon the question as to the appropriation of the proceeds of the bill when discounted or paid, and whether, in fact, the directions of the restrictive indorsement have or have not been complied with. All that can fairly be collected from the cases is this, that if, from the plain and unequivocal terms of the indorsement, the party either discounting or paying the bill is informed that the proceeds of the bill are to be paid to B, for the use of A, he cannot pay or appropriate them to the use of B. But how does this affect the right of B to sue for the benefit of A in the event of non-payment?"

See *Brown v. Jackson*, 1 Wash. C. C. 512; *Leary v. Blanchard*, 48 Me. 269; *Wilson v. Holmes*, 5 Mass. 542; *Sims v. Wilkins*, 13 Miss. 234; *Marine Bank v. Vail*, 6 Bosw. 421; *Drew v. Jacocks*, 2 Murphey, 138. — *Ed.*

MITCHELL v. CULVER.

IN THE SUPREME COURT, NEW YORK, MAY, 1827.

[Reported in 7 Cowen, 336.]

ASSUMPSIT on a promissory note; second indorsee against second indorser; tried at the Ulster Circuit, April 17, 1826, before Betts, (late) chief judge.

The note was made by Rowe, payable to H. at sixty days, for \$200, and purported to bear date November 5, 1825. This note, having a blank for the day of the month, was made on the 27th of November, 1825, and indorsed by H. and the defendant. It was afterwards delivered by the maker to the plaintiff in payment of a debt, who, by direction of the former, filled in the "5th."

Verdict for the plaintiff, subject to the opinion of this court.

T. J. Oakley, for the plaintiff, cited Dougl. 514; 5 Cranch, 151; 4 Mass. 45, 55.

H. M. Romeyn, contra, cited Chit. Pl. 53; Swift's Dig. 251; Com. Dig. Fait (B. 3); 2 Ld. Raym. 1076; 7 T. R. 593; 12 Mod. 204; 12 Mod. 193, 651; 4 T. R. 320, *per* Buller, J.; 3 B. & P. 173; 2 John. 300; 20 John. 288; Com. Dig. Fait (F.); 4 T. R. 320; 2 H. Bl. 141; 3 Esp. Rep. 155; 3 Esp. Rep. 57, 246; Esp. Dig. 76; 10 East, 531; 2 Caines, 343; 7 Serg. & Rawle, 500; 19 John. 391.

CURIA, PER SUTHERLAND, J. This case is not distinguishable in principle from that of the Mechanics' and Farmers' Bank v. Schuyler,¹ decided at the last term. The only difference is that here the date was inserted with the knowledge of the plaintiff. But I do not perceive that this can vary the case. When an indorser of a note commits it to the maker, with the date in blank, the note carries on the face of it an implied authority to the maker to fill up the blank. As between the indorser and third persons, the maker, under such circumstances, must be deemed to be the agent of the indorser, and as acting under his authority and with his approbation. Although it is not essential to the legal validity of a note that it should be dated, yet we all know that it is necessary to its free and uninterrupted negotiability. A note without a date will not be discounted at our banks, nor pass in the money market without previous inquiry. All the parties, therefore, to a note intended for circulation, must be presumed to consent that the person to whom such a note is intrusted for the purpose of

¹ 7 Cow. 336 n.

raising money may fill up the blank with a date. The evidence does not show that the plaintiff paid less for the note than its face.

*Judgment for the plaintiff.*¹

EPLER v. FUNK.

IN THE SUPREME COURT, PENNSYLVANIA, MAY TERM, 1848.

[Reported in 8 Barr, 468.]

IN error from the Common Pleas of Dauphin County.

The facts of the case are fully stated in the opinion of this court.

Fisher, for plaintiff in error.

McCormick, contra.

July 8. ROGERS, J. This is an action by an indorser against the maker to recover \$100, payable to the order of Henry Hamer, twelve months after date. It is indorsed to J. M. Funk, without recourse. The defence is that the consideration of the note was for the right of vending Hoover's patent corn-stalk cutting-machine in Dauphin County; that the machine was entirely worthless, and that defendant was induced to enter into the contract by combination, contrivance, and fraud.²

The defendant contends that, under the circumstances exhibited on the face of the note, on the special indorsement and the facts given in evidence, he is entitled to make the same defence against the indorser as between the original parties to the note. The note is indorsed by the payee to the order of J. M. Funk, the plaintiff, "without recourse." This, it is said, is not in the usual course of business; that it was sufficient to put the indorser on his guard, and to lead him to suspect there was something wrong in the transaction, as between the maker and payee. But although most usually notes go forth indorsed in blank, yet I cannot agree that such an indorsement affects the negotiable quality of the paper. It shows only an unwillingness to be answerable for the solvency of the maker, — a prudent precaution, particularly where, as here, the note has a long time to run before it matures. And this is the view taken of this fact in *Rice v. Stearns*. In that case, a promissory note was indorsed specially thus: "For value received, I order the contents of the note to be paid to A. B.,

¹ Page v. Morrell, 3 Keyes, 117, *accord*.

Inglish v. Breneman, 5 Ark. 377; 9 Ark. 122, *contra*.

See Bell v. State Bank, 7 Blackf. 456. — ED.

² A portion of the case relating to questions of evidence and practice has been omitted. — ED.

at his own risk." Two points were ruled: 1st, That in an action on such a note, by the indorser against the maker, the promisee is a witness to prove the execution of the note. 2d, Which I take it is the case here, such special indorsement transfers the property of the note, with its negotiable quality, to the indorser.

*Judgment affirmed.*¹

KIEFFER v. EHLER.

IN THE SUPREME COURT, PENNSYLVANIA, 1852.

[Reported in 18 *Pennsylvania Reports*, 388.]

ERROR to the Common Pleas of Lancaster County.

This was a proceeding by attachment execution by John Ehler v. John Lenher, the defendant in the judgment, and Christian Kieffer, garnishee.

The facts of this case were as follows: John Ehler, the plaintiff below, obtained a judgment against John Lenher, the defendant, No. 206, to January term, 1851, in the Common Pleas of Lancaster County, for a real debt of \$1,036.89, payable forthwith, which was entered February 28, 1851.

On the 6th of March, 1851, Christian Kieffer (the garnishee) gave his note to the said Lenher, for the sum of \$273.66, payable in three months, and of which the following is a copy:—

"\$273.66.

LANCASTER, March 6, 1851.

"Twelve months after date, I promise to pay to the order of Jno. Lenher, at the Lancaster Savings Institution, Two Hundred and Seventy-three $\frac{66}{100}$ dollars without defalcation, for value received, without interest.

C. KIEFFER."

¹ *Cone v. Baldwin*, 12 Pick. 545; *Goddard v. Lyman*, 14 Pick. 268; *Borden v. Clark*, 26 Mich. 410; *Russell v. Ball*, 2 Johns. 50; *Bisbing v. Graham*, 14 Pa. 14; *Lomax v. Picot*, 2 Rand. 247, 260, *accord*.

See *Ayer v. Hutchins*, 4 Mass. 370.

The insertion in a bill or note of the consideration for which it was given will not charge a holder for value, in the event of the failure of the consideration, with notice thereof. *Bank of Commerce v. Barrett*, 38 Ga. 126 (but see *Harris v. Nichols*, 26 Ga. 413); *Henneberry v. Morse*, 56 Ill. 394; *Hereth v. Meyer*, 33 Ind. 511; *Hereth v. Merchants' Bank*, 34 Ind. 380; *Doherty v. Perry*, 38 Ind. 15; *Barker v. Valentine*, 10 Gray, 341; *Borden v. Clark*, 26 Mich. 410; *Aspinwall v. Meyer*, 2 Sandf. 180; *Mabie v. Johnson*, 8 Hun, 309; *Ryland v. Brown*, 2 Head, 270; *Andrews v. Hart*, 17 Wis. 297.

But see *contra* *Howard v. Kimball*, 65 N. Ca. 175; *Thrall v. Horton*, 44 Vt. 386 (*semble*).

Conf. Patten v. Gleason, 106 Mass. 439; *Davis v. McCready*, 17 N. Y. 230; *Craig v. Sibbett*, 15 Pa. 238. — ED.

On the 29th of March, 1851, an attachment was issued by Ehler, the plaintiff below, against the said Lenber, defendant, and C. Kieffer, garnishee, to April term, 1851, No. 127, in satisfaction of the judgment above stated; to which the sheriff made return that, on March 29, 1851, he attached the goods, &c., moneys, rights, and credits of the defendant in the hands of Christian Kieffer, and summoned him as garnishee, and informed him of the proceedings by reading the writ to him and by giving him a copy.

On the 1st of May, 1851, the note in question was discounted by the Lancaster Savings Institution, a corporation, for a valuable consideration, and without notice.¹

LONG, J., was of opinion that, though the law relating to commercial paper protects an innocent holder without notice, yet in this case there was legal notice to the Savings Institution of the attachment. 1 Story's Eq. §§ 405, 406; 2 Vern. 162; 14 Serg. & R. 118, opinion of Duncan, J.

Judgment was entered against the garnishee, to which error was assigned.

Ford, with whom was *Lightner*, for the garnishee and the Savings Institution.

Franklin, for defendant in error.

The opinion of the court was delivered, May 27, by

LOWRIE, J. Care is to be taken that laws of general, shall not be regarded as of universal, application; and this caution is required in relation to the law for attaching debts in execution, and declaring that "all debts" so attached shall remain in the hands of the garnishees to answer the debt. In acts of assembly, as well as in common parlance, the word "all" is a general rather than a universal term, and is to be understood in one sense or the other, according to the demands of sound reason. It is certainly broad enough to include debts due by bills of exchange and promissory notes; and there is nothing in their nature that excludes them from its operation. But they have a legal quality that renders the hold of an attachment upon them very uncertain.

Unlike all other property, they carry their whole evidence of title on their face; and the law assures the right of him who obtains them for valuable consideration, by regular indorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as should lead to inquiry. To hold that an attachment prevents a subsequent *bona fide* indorsee for value from acquiring a good title would be almost a destruction of one of the essential characteristics of nego-

¹ The statement of the case has been slightly abbreviated. — ED.

tible paper. It would be a great injury to persons in embarrassed circumstances holding such paper; for no one could buy it from them with any confidence in the title. Moreover, it would present the strange result that the more hands such paper had passed through, and the more indorsers there were on it, the less it would be worth in the money market; for it would be subject to the more risks of attachment. Under such views, it has always been held that an attachment is unavailable against a *bona fide* holder for value of negotiable paper, who obtains it after attachment, before maturity, and without notice. *Ludlow v. Bingham*,¹ *Maine Insurance Co. v. Weeks*,² *Enos v. Tuttle*,³ *Huff v. Miller*,⁴ *Hinsdill v. Safford*,⁵ *Little v. Hale*,⁶ *Eunson v. Healy*,⁷ *Grant v. Shaw*,⁸ *Cushman v. Haynes*.⁹

The doctrine of implied notice by *lis pendens* is totally inapplicable to such cases, and is everywhere weakened in its operation, even when it is admitted to exist. In a case of bankruptcy, notice may be implied, because that refers to the general circumstances of a previous holder, into which a purchaser is expected to inquire, and not to a special fact, like an attachment, which may have its origin in any magistrate's office in any county in the State.

Certainly, the negotiation of such paper by a defendant after he has had notice of the attachment is a fraud upon the law; and we think that the court from which the attachment issues has power to prevent this by requiring the instrument to be placed in such custody as will prevent it from being misapplied, taking care that it shall be demanded at maturity, and that proper notice be given to indorsers, if necessary; and that the money, if paid, shall stand in place of the note or bill to abide the event.

*Judgment reversed, and judgment for defendant below.*¹⁰

¹ 4 Dallas, 47.

² 7 Mass. 439.

³ 3 Conn. 27.

⁴ 7 Yerg. 42.

⁵ 11 Vt. 309.

⁶ 11 Vt. 482.

⁷ 2 Mass. 32.

⁸ 16 Mass. 344.

⁹ 20 Pick. 132.

¹⁰ *Pratt v. Burr*, 5 Biss. 50; *In re G. W. Tel. Co.*, 5 Biss. 363; *Winston v. Westfeldt*, 22 Ala. 760; *Enos v. Tuttle*, 3 Conn. 27; *Mims v. West*, 38 Ga. 18; *Hibernian Bank v. Everman*, 52 Miss. 500 (*semble*); *Chase v. Searles*, 45 N. H. 511 (*semble*); *Murray v. Lylburn*, 2 Johns. Ch. 441 (*semble*); *Lindsley v. Diefendorf*, 43 How. Pr. 357; *Leitch v. Wells*, 48 N. Y. 585 (*semble*); *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Stone v. Elliott*, 11 Oh. St. 252; *Howe v. Hartness*, 11 Oh. St. 449; *Ludlow v. Bingham*, 4 Dall. 47; *Hill v. Kroft*, 29 Pa. 186; *Diamond v. Lawrence Co.*, 37 Pa. 353; *Day v. Zimmerman*, 68 Pa. 72; *Board v. Texas R.R.*, 46 Tex. 316; *Hinsdill v. Safford*, 11 Vt. 309; *Little v. Hale*, 11 Vt. 482; *Kellogg v. Fancher*, 23 Wis. 21 (*semble*), *accord*.

Somerville v. Brown, 5 Gill, 399, *contra*.

See *Jervis v. White*, 7 Ves. 413; *Hood v. Aston*, 1 Russ. 412.

See also *Minell v. Read*, 26 Ala. 730; *Nat. Bank v. Texas*, 20 Wall. 88.—ED.

FIELDEN v. LAHENS.

IN THE COURT OF APPEALS, NEW YORK, SEPTEMBER, 1867.

[*Reported in 2 Abbott's Decisions of the Court of Appeals*, 111.]

THOMAS FIELDEN and others sued Pierre François Lahens and others, in the Superior Court of the city of New York, on October 21, 1844. The complaint was against the defendants, as alleged indorsers of three promissory notes, all dated May 25, 1844, two of them payable at ninety days, and one at sixty days from date: one for fourteen thousand dollars, one for thirteen thousand five hundred dollars, and the third for twenty-one thousand two hundred and twenty-one dollars and forty-three cents, making in all forty-eight thousand seven hundred and twenty-one dollars and forty-three cents. They were in the common form, signed by Alexander Caselli, as maker, and indorsed with the name of J. Lahens, &c.

The defendant, Louis Emile Lahens, appeared by one attorney, and the defendants, Pierre François Lahens and Edward Ernest Lahens, by another, and put in separate pleas of the general issue; and the cause was referred to three referees, who upon the trial, which commenced February 4, 1858, nonsuited the plaintiffs.¹

The referees found, first, that at the time of the making of and indorsing of the promissory notes in the declaration in this action set forth, Joshua Fielden, John Fielden, James Fielden, Thomas Fielden, Daniel Campbell, and William C. Pickersgill were copartners in trade under the respective firms of Fielden Brothers & Co., at the city of Liverpool in England, and of W. C. Pickersgill & Co., at the city of New York; that the said Joshua Fielden, John Fielden, and James Fielden have since departed this life, and that the said Thomas Fielden, Daniel Campbell, and W. C. Pickersgill have survived them; also, that at the time of the making and indorsing of the said promissory notes, Pierre François Lahens, Edward Ernest Lahens, Edward Gaudard, and Louis Emile Lahens were copartners in mercantile business at Havre in France, and at the city of New York, respectively, under the firm of J. Lahens & Co.; that the said Louis Emile Lahens was the only one of said copartners then residing in the city of New York or in the United States; that the said Edward Gaudard has since departed this life, and that the defendants in this action have survived him.

Second, that the indorsements of the name of J. Lahens & Co. upon the said promissory notes were made and executed in the city of New

¹ A portion of the case relating to questions of practice has been omitted. — ED.

York by the defendant, Louis Emile Lahens, one of the members of said firm, and delivered by him to Alexander Caselli, the maker of the said notes, in said city, for the accommodation of said Alexander Caselli, and that no consideration was received by the said J. Lahens & Co. for the same.

Third, that the notes so indorsed were delivered by the said Alexander Caselli, the maker thereof, to the said firm of W. C. Pickersgill & Co., at the said city of New York.

Fourth, that the said W. C. Pickersgill & Co., by the fact of such possession and delivery of the said notes to them by the maker thereof, after the same had been so indorsed with the name of said J. Lahens & Co., had notice that the said J. Lahens & Co. had received no value therefor, and that the said indorsements were made for the benefit and accommodation of the maker of the said notes.

Fifth, that the plaintiffs had failed to prove the joint liability of the defendants. They further reported that, upon the said facts so found as a conclusion of law, the plaintiffs having so failed to prove a joint liability of all the defendants, cannot recover in this action against the said defendants, or against any or either of them.

The judgment entered upon the report of the referees was affirmed by the Superior Court at general term. 9 Bosw. 436. Plaintiffs appealed.

Jeremiah Larocque, for plaintiffs, appellants.

Charles O'Conor, for the respondents, P. F. and E. E. Lahens, — as to the merits, — cited and commented on *Farmers' Bank of Kent v. Butchers' & Drovers' Bank*,¹ *New York Fire Ins. Co. v. Bennett*,² *Bank of Rochester v. Bowen*,³ *Foot v. Sabin*,⁴ *Laverty v. Burr*,⁵ *Boyd v. Plumb*,⁶ *Stall v. Catskill Bank*,⁷ *Bank of Vergennes v. Cameron*,⁸ *Bank of Genesee v. Patchin Bank*,⁹ *Vallett v. Parker*.¹⁰

J. M. PARKER, J. [After stating the facts.] The first question considered and decided by the referees, as their report shows, was: whether the firm of J. Lahens & Co. were liable upon the indorsements.

The facts found, bearing upon the first question, are that the firm of J. Lahens & Co. was a mercantile firm; that Louis Emile Lahens, one of the copartners, made the indorsements in the name of the firm, for the accommodation of the maker, without consideration to the firm; that the plaintiffs received the notes so indorsed from the hands of the maker, and that by the fact of their so receiving them they had knowledge that the firm of J. Lahens & Co. had received no value

¹ 16 N. Y. 135.

⁴ 19 Johns. 156.

⁷ 18 Wend. 478.

¹⁰ 6 Wend. 622.

² 5 Conn. 580.

⁵ 1 Wend. 529.

⁸ 7 Barb. 143.

³ 7 Wend. 159.

⁶ 7 Wend. 310.

⁹ 13 N. Y. 816; s. c. 19 N. Y. 814.

therefor, and that the indorsements were made for the maker's accommodation.

These facts undoubtedly warrant the conclusion of law that the firm was not liable upon the indorsement.

The principle of the cases is that, inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership has no interest, for such purpose, and that the holder of such paper so indorsed, who takes it with notice that the indorsement was made for the accommodation of the maker, cannot hold the firm liable upon it. *Stall v. Catskill Bank*,¹ *Bank of Rochester v. Bowen*,² *Joyce v. Williams*,³ *Gansevoort v. Williams*,⁴ *Austin v. Vandermark*.⁵

The finding that the plaintiffs had notice of the fact that the indorsements were mere accommodation indorsements, it is insisted by the plaintiff's counsel, is but a conclusion of law, and not a finding of fact, and is therefore open to examination. Inasmuch as the fact of notice is based upon the facts of the possession of the notes by the maker, and his delivery of them, bearing the indorsement of J. Lahens & Co., to the plaintiffs, thereby using them for his own benefit, the question of the legal sufficiency of such facts to constitute notice to the plaintiffs is undoubtedly involved in the finding. Treating it, therefore, as a conclusion of law, from the facts distinctly found and necessarily inferred, I think the referees right in their conclusions.

It was said by the Chancellor, in *Stall v. Catskill Bank*,¹ "If the drawer of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person, with the name of a firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank, or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note."

This statement of the rule is, I think, substantially correct. The note being held by the maker, and put into circulation by him, in his own business, and for his own advantage, is evidence to the party taking it that whatever indorsements may be upon it were made for the maker's benefit, and not in the ordinary course of business; for, in the ordinary course of business, it would have passed from the maker

¹ 18 Wend. 466, 477, 478.

² 7 Wend. 158.

³ 14 Wend. 141.

⁴ 14 Wend. 143.

⁵ 4 Hill, 259.

to the payee and indorser. The party receiving it, therefore, from the maker, in payment of the maker's debts, assumes the risk of being able to show that the indorsement was in the usual course of business, and that the partners all consented to the act of the one who made the indorsement. As between the firm and the holder of the paper, this is but a reasonable rule. The partners are liable to a *bona fide* holder without notice in such case, only because he has the right to presume that the indorsement was made in the usual course of the partnership business, and therefore within the scope of the authority of the individual member of the firm who made it. But when the circumstances are such as to inform the holder of the fact that the indorsement was not made in the course of the partnership business, such presumption is excluded; and it would be inequitable as well as illegal, as between the firm and the holder, for the court to presume the assent of the firm in favor of the holder thus notified. *Austin v. Vandermark*,¹ *Bank of Vergennes v. Cameron*.²

The finding that the plaintiffs had notice that the indorsements were for Caselli's accommodation being warranted, it follows that no judgment could be rendered upon them against the members of the firm other than Louis Emile Lahens.

A majority of the judges concurred.³

¹ 4 Hill, 259, 262.

² 7 Barb. 143.

³ *Savings Bank v. Parmalee* (U. S. Sup. Ct., December, 1877), 5 Reporter, 33; *Lemoine v. Bank of N. America*, 3 Dill. 44; *Wallace v. Branch Bank*, 1 Ala. 565; *Mauldin v. Branch Bank*, 2 Ala. 502; *Saltmarsh v. P. & M. Bank*, 14 Ala. 668; *Carlisle v. Hill*, 16 Ala. 398; *Noble v. Walker*, 32 Ala. 456; *Hendrie v. Berkowitz*, 37 Cal. 113; *Crane v. Trudeau*, 19 La. An. 307; *Bloom v. Helm*, 53 Miss. 21 (*semble*); *Stall v. Catskill Bank*, 18 Wend. 466 (*semble*); *Austin v. Vandermark*, 4 Hill, 259 (*semble*); *Powell v. Waters*, 8 Cow. 688, 689 (*semble*); *Bank v. Vergennes*, 7 Barb. 143; *Erwin v. Shaffer*, 9 Oh. St. 43; *Parke v. Smith*, 4 W. & S. 287; *Tanner v. Hall*, 1 Barr, 417; *Cooper v. McClurkan*, 22 Pa. 80; *Runyan v. Reed*, 5 Pa. L. J. 439; *Mullison's Estate*, 68 Pa. 212; *Losee v. Bissell*, 76 Pa. 459; *Moorehead v. Gilmore*, 77 Pa. 118 (*semble*); *Overton v. Hardin*, 6 Coldw. 375, *accord*.

Conf. Wait v. Thayer, 118 Mass. 473.

One of the two points decided in the principal case, namely, that a person who receives the obligation of a partnership, ostensibly given by way of accommodation or guarantee, takes it at the peril of proving that it was made with the authority, express or implied, of all the members of the firm is illustrated by the following cases, in addition to those already cited: *New York Co. v. Bennett*, 5 Conn. 580; *Chenoweth v. Chamberlin*, 6 B. Mon. 60; *Darling v. March*, 22 Me. 184; *Sweetzer v. French*, 2 Cush. 309; *Andrews v. Planters' Bank*, 15 Miss. 192; *Langan v. Hewett*, 21 Miss. 122; *Foot v. Sabin*, 19 Johns. 154; *Laverty v. Burr*, 1 Wend. 529; *Bank of Rochester v. Bowen*, 7 Wend. 158; *Boyd v. Plumb*, 7 Wend. 309; *Gansevoort v. Williams*, 14 Wend. 133; *Joyce v. Williams*, 14 Wend. 141; *Tennessee Bank v. Saffarars*, 3 Humph. 597. See to the same effect *Farmers' Bank v. Troy Bank*, 1 Doug. (Mich.) 457. — Ed.

THE CENTRAL BANK OF BROOKLYN, RESPONDENT, *v.*
BARNABAS HAMMETT AND OTHERS, APPELLANTS.IN THE COURT OF APPEALS, NEW YORK, APRIL 19, NOVEMBER 12,
1872.[Reported in 50 *New York Reports*, 159.]

APPEAL from the judgment of the general term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

The action is brought upon a bill of exchange, drawn by the defendants on and accepted by Balch & Co., payable to the order of the plaintiff, dated October 31, 1868, at four months.

Balch & Co. were indebted to the defendants, and the defendants drew the draft, and [Balch & Co. accepted and?] delivered it to the defendants on account of such indebtedness, and for the purpose of enabling the defendants to have it discounted for their own benefit.

The defendants failing to get it discounted, Balch & Co. gave defendants another acceptance for the same amount, and [the defendants?] with instructions to have it cancelled surrendered this one to them.

Instead of doing this, Balch & Co. presented it to plaintiff for discount to procure funds to pay a note previously discounted by the bank for them.

The bank discounted the bill, passed the proceeds to the credit of Balch & Co., and out of the moneys paid the note it had.

John C. Dimmick, for the appellants. To constitute a *bona fide* holder of commercial paper, it must be purchased of one either owning or apparently the owner of what he proposes to sell. *Belmont Branch Bank v. Hoge*,¹ *Hoge v. Lansing*.²

J. C. Bergen, for the respondent. If the bank had paper of Mr. Balch lying over, and it was taken up by this bill of exchange, that would be no defence. Albany L. J., Oct. 29, 1870, p. 327; 34 N. Y. 247; 40 N. Y. 457.

PER CURIAM. The plaintiff claims to recover as a *bona fide* holder for value of the bill in suit. A *bona fide* holder of negotiable paper is one who has acquired the title good faith for a valuable consideration from one capable of transferring it, or from one in possession of the paper with an apparent right to transfer it, and without notice of any defect in his title or right to transfer. One who obtains the trans-

¹ 35 N. Y. 65.² 35 N. Y. 136.

fer of negotiable paper before maturity, and for full value, without notice of any defect in the title of the apparent owner, acquires and has all the rights of a *bona fide* holder, by title derived from the actual owner. *Belmont Branch Bank v. Hoge*.¹ The possession of a bill or note payable to bearer, or indorsed in blank by one not a party to the instrument, is presumptive evidence of ownership. But a possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself. The actual relations to each other of the several parties to the instrument are presumed to be precisely such as the law declares, in the absence of any special circumstance to take the instrument out of the general rule, and vary the liabilities of the parties as between each other.

An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other or different rights, or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument. *Hoge v. Lansing*.² The plaintiff acquired the title to the bill from Balch & Co., the drawees and acceptors, the persons primarily liable for the payment of the debt. It could only, in the ordinary course of business, and according to mercantile usage, have been in the possession of the transferrer either for acceptance or after it had been paid, and in neither case would they have had the right to transfer it. In the first case, they would have had possession of it for a special purpose, and not as owners, and in the latter it would have become *functus officio*, and not capable of being again put in circulation. There was no apparent ownership in Balch & Co., or presumptive right to transfer the bill to the plaintiff.

If the paper had been made for the accommodation of the drawees, and to be used by them, that fact should have been proved.

The law will not presume the paper to have been made except in the ordinary course of business, and according to commercial usage.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur, except PECKHAM, J., dissenting.

*Judgment reversed.*³

¹ 85 N. Y. 65.

² 35 N. Y. 136.

³ *Eckert v. Cameron*, 43 Pa. 120; *Mishler v. Reed*, 76 Pa. 76; *Witte v. Williams*, 8 S. Ca. n. s. 290, *contra*.

See *Bank of Marietta v. Haynes*, 23 Oh. St. 637.

In *Eckert v. Cameron*, *supra*, Strong, J., who delivered the opinion of the court,

said, pp. 127, 128 : " A bill or note which has been once in circulation, overdue, and coming from the hands of the acceptor or maker is presumed to be extinguished. Byles on Bills, 180 ; McGee v. Prouty, 9 Met. 546. This is because it was the duty of the maker or acceptor to take it up when it fell due, and therefore it is fairly inferable from his possession of it, after that time, that it has fulfilled its office. But before it has fallen due, the maker of a promissory note is under no obligation to take it up, and the reason fails for presuming its extinguishment from his then having it in his possession." See also Attenborough v. Mackenzie, *infra*, 842, 844, n. 1. — ED.

A person who advances money to another in consideration of the latter's promise to transfer to him certain specified negotiable securities not yet in the possession of the promisor will not acquire, by a subsequent delivery to himself of the securities, the rights of a *bona fide* purchaser. Muller v. Pondir, 55 N. Y. 325 (*semble*). See also Taft v. Chapman, 50 N. Y. 445 ; Brownson v. Chapman, 63 N. Y. 625. Similarly, one who purchases goods from an insolvent or fraudulent vendee, and pays the purchase price before the goods or other *indicia* of ownership have come to the possession of such vendee, will not acquire, by a subsequent delivery of the goods to himself, the rights of a *bona fide* purchaser. Barnard v. Campbell, 55 N. Y. 456 ; 58 N. Y. 73, s. c. (overruling Fenby v. Pritchard, 2 Sandf. 151). See also Roger v. Comptoir d'Escompte, L. R. 2 P. C. 393.

In all these cases, the purchaser advances his money, not in reliance upon the apparent ownership of his transferrer, but in reliance upon the latter's promises and representations. But see Leask v. Scott, 2 Q. B. D. 376, *contra*. — ED.

The cases, Miller v. Crayton, 3 Th. & C. 360, and Huston v. Young, 33 Me. 85, which properly belong in this section, will be found in the Appendix to this volume, pp. 888-892. — ED.

SECTION V.

Overdue or Dishonored Paper.

BROWN v. DAVIES.

IN THE KING'S BENCH, FEBRUARY 5, 1789.

[Reported in 3 Term Reports, 80.]

THIS was an action by the indorsee of a promissory note against the maker.

The plaintiff, at the trial before Lord Kenyon at the last sittings at Guildhall, rested his case upon the proof of the maker's and payee's handwriting. The note appeared upon the face of it to have been drawn on the 6th of October, 1788, payable to Sandal or order, and to have become due the 13th of November: it had Sandal's indorsement upon it, and had been noted for non-payment. Whereupon the defendant's counsel offered to prove these facts: that Sandal, having indorsed it in blank, delivered it to Taddy, by whom it had been noted for non-payment; that, on the 6th of December, Sandal, having been paid by the defendant, the maker of the note, took it up from Taddy, and afterwards, without the knowledge or consent of the defendant, negotiated it to the plaintiff. But his lordship being of opinion that, unless knowledge was brought home to this plaintiff, it would make no difference between these parties, rejected the evidence, and the plaintiff had a verdict.

Le Mesurier moved in this term for a rule to show cause why there should not be a new trial, in order to let the defendant into proof of the above facts; and cited a case of *Banks v. Colwell*, at Launceston spring assizes, 1788, before Mr. Justice Buller. This was an action by the indorsee of a promissory note, payable on demand against the maker. The defendant there was admitted to give evidence that the note had been indorsed to the plaintiff a year and a half afterwards; and to impeach the consideration by showing that it had originally been given for smuggled goods, and that payments had been made upon it at several times. But, though no privity was brought home to the plaintiff, Mr. Justice Buller was clearly of opinion that he ought to be nonsuited; for he said it had been repeatedly ruled at Guildhall that wherever it appears that a bill or note has been indorsed over

some time after it is due, which is out of the usual course of trade, that circumstance throws such a suspicion upon it that the indorsee must take it upon the credit of the indorser, and must stand in the situation of the person to whom it was payable; and here it appeared that the consideration was illegal. Therefore, he nonsuited the plaintiff. The principle of that case cannot be distinguished from the present, according to which the plaintiff must stand in the situation of Sandal with respect to the Defendant, and consequently was not entitled to recover.

Erskine now showed cause, contending that there was no evidence offered to show that the plaintiff knew the note to have been satisfied; neither was there any circumstance attending it, which might reasonably lead a prudent man to suspect that it had: one or other of which was essentially necessary to disqualify the plaintiff from maintaining his action. For he had paid a valuable consideration for the note to the original payee, in whose hands it might properly be supposed to be. And this objection does not lie in the defendant's mouth, whose negligence in not taking up the bill, when he satisfied Sandal, had left it in the power of the latter to deceive an innocent third person.

Le Mesurier said, in addition to his former argument, that there was a reasonable ground of suspicion on the face of the note; for the plaintiff received it after it was due, when it appeared to have been noted.

LORD KENYON, C. J. I think this matter ought to be further inquired into. It did not strike me at the trial that there was this suspicious circumstance on the face of the note; for, if it appeared to have been noted for non-payment at the time the plaintiff received it, that ought to have awakened his suspicion, and led him to make further inquiries into the goodness of the note.

ASHHURST, J. I think the rule laid down by my brother Buller, in the case in Cornwall, is a very safe and proper one: that where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one, otherwise much mischief might arise.

BULLER, J. There is this distinction between bills indorsed before and after they become due. If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on his own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Still stronger ought that suspicion to be, when it appears on the face of the note to have been noted for non-payment, which was the case here.

But generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him. Upon this ground it was that in the case in Cornwall I held that the defendant, who was the maker, was entitled to set up the same defence that he might have done against the original payee; and the same doctrine has been often ruled at Guildhall. A fair indorsee can never be injured by this rule; for, if the transaction be a fair one, he will still be entitled to recover. But it may be a useful rule to detect fraud whenever that has been practised. [Upon Lord Kenyon's appearing to dissent from the generality of the doctrine held by Mr. Justice Buller, he proceeded to observe:] My Lord thinks I have gone rather too far in something that I have said, but it is to be observed that I am speaking of cases where the note has been indorsed after it became due, when I consider it as a note newly drawn by the person indorsing it.

LORD KENYON, C. J. I agree with that, with the addition of this circumstance, that it appears on the face of the note to have been dishonored, or if knowledge can be brought home to the indorsee that it had been so. But I should think otherwise, if no notice can be fixed on the party; at least, I am not prepared to go that length at present.

GROSE, J. If collusion should be proved between the defendant and Sandal, then the former will not be entitled to set up this objection. But at present I am of opinion that a new trial ought to be granted.

*Rule absolute.*¹

¹ It is now well settled that, while in general the legal title to a bill or note continues assignable after dishonor, the transferrer can nevertheless give no greater interest than he himself has in the paper to his transferee. Accordingly, any defence that would have been valid in an action on a bill or note by the transferrer is equally valid against the transferee of such paper, *v. g.* :—

PAYMENT. *Gordon v. Wansey*, 21 Cal. 77; *Elgin v. Hill*, 27 Cal. 372; *Capps v. Gorham*, 14 Ill. 198; *McLain v. Lohr*, 25 Ill. 507; *Bates v. Kemp*, 12 Iowa, 99; *Kurz v. Holbrook*, 13 Iowa, 562; *Schuster v. Marden*, 34 Iowa, 181; *Davis v. Bradley*, 26 La. An. 555; *Hatch v. Dennis*, 10 Me. 244; *Gold v. Eddy*, 1 Mass. 1; *Baker v. Wheaton*, 5 Mass. 509; *Potter v. Tyler*, 2 Met. 58; *American Bank v. Jenness*, 2 Met. 298; *Mackay v. Holland*, 4 Met. 69; *Shipp v. Stacker*, 8 Mo. 145; *Kellogg v. Schnaake*, 56 Mo. 136; *Little v. Cooper*, 3 Stock. 224; *Merrick v. Butler*, 2 Lans. 103; *Reakert v. Sanford*, 5 W. & S. 164; *Perry v. Mays*, 2 Bail. 354 (*semble*); *Miller v. Bingham*, 29 Vt. 82; *Dunbar v. Harnesberger*, 12 Wis. 373.

FRAUD. *Taylor v. Mather*, 3 T. R. 83 n.; *Tinson v. Francis*, 1 Camp. 19; *Coghlin v. May*, 17 Cal. 515; *Thomas v. Kinsey*, 8 Ga. 421; *Bertrand v. Barkman*, 13 Ark. 150 (*semble*); *Stafford v. Fargo*, 35 Ill. 481; *Stricklin v. Cunningham*, 58 Ill. 293; *Whitwell v. Crehore*, 8 La. 540; *Butler v. Murison*, 18 La. An. 363; *Clarke v. Dederick*, 31 Md. 148; *Tucker v. Smith*, 4 Greenl. 415; *Howard v. Ames*, 3 Met. 308; *Kellogg v. Barton*, 12 All. 527; *Wheeler v. Barret*, 20 Mo. 573; *Livermore v. Blood*, 40 Mo. 48; *De Mott v. Starkey*, 3 Barb. Ch. 403; *Nellis v. Clark*, 4 Hill, 424; *Reed v. Warner*, 5 Paige, 650; *Bacon v. Burnham*, 37 N. Y. 614; *Long v. Rhawn*,

CHARLES AND ANOTHER v. MARSDEN.

IN THE COMMON PLEAS, MAY 20, 1808.

[Reported in 1 Taunton, 224.]

THIS was an action brought by the plaintiffs as indorsees of a bill of exchange drawn by Atkinson against the acceptor. The defendant pleaded that he had accepted the bill for the use and accommodation of Atkinson, and without any consideration whatsoever for the same; and that afterwards, and after the time when the bill became due and payable, Atkinson indorsed it to the plaintiffs,—they well knowing at the time of such indorsement that it had been and was so accepted by the defendant for the use and accommodation of Atkinson, and that the defendant had not ever received any consideration whatsoever for the same. The plaintiffs replied (with a protestation of the insufficiency of the plea) that Atkinson indorsed the bill to them before the time when it became due, and not after, as the defendant had alleged; and that, they prayed, might be inquired of by the country. The defendant demurred, and assigned for cause that the replication concluded to the country, whereas, inasmuch as the plaintiffs had offered an issue only on one of the facts set forth in the plea, and not on all, they ought to have concluded their replication to the court with a verification.

75 Pa. 128; McNeill v. McDonald, 1 Hill (S. Ca.) 1; Goodson v. Johnson, 35 Tex. 622; Sargeant v. Sargeant, 18 Vt. 371; Gregory v. Hart, 7 Wis. 532.

ILLEGALITY. Brown v. Turner, 7 T. R. 630; Bissell v. Gowdy, 31 Conn. 47; Green v. Louthain, 49 Ind. 139; Barlow v. Scott, 12 Iowa, 63; Kurz v. Holbrook, 13 Iowa, 562; Kittle v. DeLamater, 3 Neb. 325 (*semble*); Southard v. Porter, 43 N. H. 379; Bell v. Wood, 1 Bay, 249.

FAILURE OF CONSIDERATION. Boehm v. Sterling, 7 T. R. 423; Bryan v. Primm, 1 Ill. 33; Sawyer v. Hoovey, 5 La. An. 153; Snyder v. Riley, 6 Barr, 164; Diamond v. Harris, 33 Tex. 634.

See also Folsom v. Bartlett, 2 Cal. 163; Bowen v. Thrall, 28 Vt. 382.

Similarly, no unauthorized transfer of dishonored paper will deprive the true owner of his title; a dishonored bill or note resembling in this respect an ordinary chattel. Goggerly v. Cuthbert, 2 B. & P. N. R. 170 (*semble*); Foley v. Smith, 6 Wall. 492; Texas v. White, 7 Wall. 700; Texas v. Hardenberg, 10 Wall. 68; Vermilye v. Adams Express Co., 21 Wall. 138; Gilbough v. Norfolk R. R., 1 Hughes C. C. 410; *In re Sime*, 3 Sawyer, 305 (*semble*); Bird v. Cockrene, 28 La. An. 70; Farrington v. Park Bank, 39 Barb. 645; Weathered v. Smith, 9 Tex. 622; Arents v. Commonwealth, 18 Grat. 750. But see Connell v. Bliss, 52 Me. 476, *contra*.

A transfer after maturity may, however, remove a difficulty of procedure, *e. g.*, a partnership note, payable to the order of one of the partners, and therefore good in his hands only in equity, may be collected at law by an indorsee, irrespective of the time of transfer. Thayer v. Buffum, 11 Met. 398; Richards v. Fisher, 2 All. 527; Sherwood v. Barton, 36 Barb. 284. But see, *contra*, Calhoun v. Albin, 48 Mo. 304. — Ed.

Best, Serjt., in support of the demurrer, and *Shepherd*, Serjt., *contra*, largely investigated the doctrine upon this question, as it is to be collected from the several cases of *Hedges v. Sandon*,¹ *Baynham v. Matthews*,² *Clarke v. Glass*,³ *Stanford v. Rogers*,⁴ *Smith v. Dovers*⁵ (which, *per* Lawrence, J., has been overruled), *Hayman v. Gerrard*.⁶ But the court suggested a doubt whether the plea could be supported, and desired them to turn their attention to that question. *Best* contended, on the authorities of *Brown v. Davies*, *Boehm v. Stirling*,⁷ and *Taylor v. Mather*,⁸ that the plea stated a sufficient defence to the action.

MANSFIELD, C. J. There is no allegation of fraud in this plea, nor any averment that the plaintiff did not give a valuable and full consideration for this bill: it must therefore be presumed that he did, and that there is no fraud in the transaction. He receives the bill from the proper hand which was entitled to have the possession of it, the person to whom it was payable. It is not necessarily to be inferred, because it was an accommodation bill, that there was an agreement not to negotiate it after it became due; but, if there was such an agreement, it was the defendant's own fault that the bill was outstanding: for, even supposing that the drawer had undertaken to provide for the payment when the bill became due, the acceptor had a right to require that it should be given up. It happened through his permission therefore, if the bill gave the drawer any power to delude the indorsee. None of the cases cited go so far as to support this plea.

HEATH, J. In this case, there was no inconvenience or mischief to the party.

LAWRENCE, J. I remember a former case of a sham plea, where the pleader had raised a question of great difficulty, and, it being suggested that it was a sham plea, the court required an affidavit of the truth of the facts pleaded, considering it a most gross contempt to put questions of difficulty in the shape of a sham plea. Upon this intimation of the feeling of the court, the plea was afterwards abandoned, and the debt was paid. Not, indeed, that there is any difficulty in this question; for none of the cases cited go the length contended for. Where a party has obtained the bill by fraud, or where there is any prejudice to the drawer, those cases apply; but, unless in instances of this kind, the acceptor is not relieved. This case may fall within some general expressions which have been used by the court in giving judgment, but those expressions are always to be taken with reference to the cases to which they were applied. One was a case of clear fraud:

¹ 2 T. R. 439.² 2 Str. 871.³ 1 Williams's Saund, 103, b. n.⁴ 2 Wils. 113; 2 T. R. 443, s. c.⁵ Dougl. 427.⁶ 1 Williams's Saund. 102.⁷ 7 T. R. 423.⁸ 3 T. R. 83 n.

another was a smuggling transaction. In the present case, it is to be supposed that the party persuades a friend to accept a bill for him, because he cannot lend him money. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it is due? for there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it. But, if there had been such an agreement, it should have been stated in the plea, and it might then have been a defence; but that is not so here. This bill, then, must be presumed to be given, in order that the party may raise money on it in the ordinary way. I see nothing in the transaction prejudicial to the acceptor; and the plea is bad in substance.

CHAMBRE, J. This plea is bad in substance. It was never meant that the defendant should have any consideration for the bill. If he had lent money, it would have been without consideration; but he could not perhaps lend money: he therefore lent a bill. He is not hurt, if he cannot be called upon before the time when the bill is due. There is no fraud or collusion: the indorser receives this, as he would receive any other bill. I cannot see any reason why, because there was no consideration, the bill should therefore not be negotiable. The other question would require much examination, and would render it necessary to go through the cases, some of which appear to clash, and it might be difficult to reconcile them, but it is unnecessary to give any opinion upon that point. *Judgment for the plaintiff.*

CROSSLEY v. HAM.

IN THE KING'S BENCH, MAY 14, 1811.

[Reported in 13 East, 498.]

THE plaintiff declared upon a bill of exchange, dated Portsmouth, in North America, the 10th of February, 1804, drawn by J. Clark upon Dickerson & Co., in London, for £450 sterling, payable at sixty days' sight to the defendant, or order, and indorsed by him; and alleged that the bill was presented to Dickerson & Co. for acceptance on the 27th of April following, when it was dishonored, and protested for non-acceptance, and notice thereof given to the defendant. The defendant pleaded the general issue; and at the trial before Lord

Ellenborough, C. J., at the sittings after Trinity term, 1810, the plaintiff recovered a verdict for £596, subject to the opinion of this court, on the following case:—

The bill in question, and another of the same tenor, having been drawn by Clark, and indorsed by the defendant for the accommodation of Clark, and left in Clark's hands so indorsed, were paid over by Clark to one Parry, in February, 1804. The defendant, Clark, and Parry were all residing at that time, and till after the 14th of April following, in New Hampshire, in America. Parry, on the 1st of March following, remitted the two bills to Favell & Bousfield, his correspondents in London, accompanied by directions to make a payment to the plaintiff, to whom Parry then was and still remains indebted in a large sum. The bills, having arrived in London on the 26th of April following, were left by Favell & Bousfield with Dickerson & Co. for acceptance, who returned for answer the next day that they could not accept at present; and the bills were then regularly presented by a notary and protested for non-acceptance, of which due notice was given to the defendant. On the 12th of April, 1804, Parry wrote from America a letter to the plaintiff, who resides at Halifax in Yorkshire, advising him of the before-mentioned remittance, and directions to Favell & Bousfield: shortly after the receipt of which letter in England, the plaintiff applied for the £450 to Favell & Bousfield, who on the 6th of June delivered over to him the bill of exchange in question; at the same time informing him of the previous presentment to the drawees, and their refusal to accept, and that he must take it under all the existing circumstances, and liable to all the infirmities that attended it. The bill was, on the 29th of June, presented for payment by the persons to whom the plaintiff had negotiated it, and from whom he again took it up, and was finally dishonored on that day.

The defendant produced the following instrument, with the signature of Parry, dated the 14th of April, 1804; the admissibility of which, as evidence against the plaintiff, was resisted at the trial:—

“Whereas, I have two sets of exchange for £450 sterling, each drawn by J. Clark in favor of S. Ham, on Dickerson & Co., merchants, in London, and indorsed by S. Ham; now the condition of the instrument is such that if S. Ham pay, or cause to be paid, one of the above bills in London, I, the subscriber, agree to exonerate the said S. Ham from the payment of the other bill of £450, both of which bills I have remitted to London to Favell & Bousfield. E. PARRY.”

It was further proved that on the 2d of July the defendant paid Favell & Bousfield in cash and by another note of six months £450 in

discharge of the above-mentioned bill, which at that time remained in their hands, and was thereupon delivered up to the defendant. Neither the plaintiff or Favell & Bousfield were apprised till after the said 2d of July of the above-mentioned agreement of the 14th of April, or of any other arrangement between Parry and the defendant concerning the bills, or of any infirmity in such bills with respect to either of the parties thereto, other than the drawees' refusal to accept. At the time when the £450 bill in Favell & Bousfield's hands was satisfied, no inquiry or mention was made by the defendant concerning the bill which had been handed over to the plaintiff, or any other bill than the one so satisfied; and the plaintiff had no information of any settlement with Favell & Bousfield being intended. The questions were: 1st, whether the above agreement of the 14th of April ought to have been received in evidence against the plaintiff in this action; 2d, whether, under the circumstances, the plaintiff is entitled to recover, or is barred by that agreement. If the court should be of opinion that the plaintiff was entitled to recover, the verdict was to stand; otherwise, a nonsuit was to be entered.

Marryat, for the plaintiff, contended that the instrument signed by Parry (the original holder of both the bills) in favor of Ham the indorser, agreeing to discharge him on payment of one of the bills for £450, was no evidence between these parties, as being merely *res inter alios acta*, or, if evidence, could not operate against the plaintiff, the *bona fide* assignee and holder of the other bill for a valuable consideration, and without notice of the prior agreement; that instrument being in effect nothing more than an eventual acknowledgment by Parry of a receipt of so much upon one bill in liquidation of his whole debt, which cannot discharge the defendant as indorser upon another bill in the hands of a third person not privy or consenting to the agreement. Parry, the original holder, by transmitting the two bills as distinct securities to Favell & Bousfield, his correspondents in this country, especially when accompanied with directions to them to make payment out of the fund to the plaintiff, which authorized them to negotiate the bills, thereby put it out of his power to make any equitable agreement with the indorser in prejudice of the plaintiff or any other person who might be the *bona fide* holder of the securities. [LORD ELLENBOROUGH, C. J. Favell & Bousfield were the agents of Parry, for the purpose of presenting the bills for acceptance and obtaining payment, and making a certain payment out of the fund of the plaintiff; and while the bills were in their hands, as such agents, they were liable to be affected by the acts of the principal; and so they continued to be, at least until the dishonor of the bills. Then, as the plaintiff did not take the bill in question until after it had been

dishonored, did he not, according to a variety of authorities, stand in the same situation as the persons from whom he then received it, who were the agents of Parry? Would he not therefore stand in the situation of Parry himself, who had before such negotiation of this bill bound himself by the agreement with Ham to exonerate him from the payment of it, if the other were taken up, as it has been? If so, will not the plaintiff who received the bill after its dishonor be bound by the same equity?] The bill was still current when the plaintiff took it from Favell & Bousfield; and there is a great distinction between taking it during that period and after it is overdue: in the latter case only, is it settled that the holder takes it, subject to all the equities belonging to it, in the hands of the party from whom he received it; the reason of which is that, when due, it is no longer considered as in a negotiable state. [BAYLEY, J. It is certainly still negotiable when due. But is there any case where a distinction has been taken between a bill dishonored for non-acceptance and where it is so for non-payment? It has equally the mark of dishonor on the face of it: the noting for dishonor is always annexed to the bill. LORD ELLENBOROUGH, C. J. The case of *Boehm v. Stirling*¹ shows that a note overdue is still negotiable, though the party receiving takes it subject to the equities attached to it in the hands of the former holder; but after the dishonor in the first instance the holder might immediately have sued the drawer.] Supposing the plaintiff to be affected by the equity attached to the bill as against Parry, yet nothing appears to preclude Parry himself from recovering on the bill: his assent to receive part of his demand from his debtor for the whole (no fund being provided for the satisfaction of the remainder, nor any agreement for this purpose with third persons or other creditors) would not bind him in law or equity. Then again, before the agreement was executed, the bill in question had changed hands for a valuable consideration. It was assigned to the plaintiff by Favell & Bousfield on the 6th of June; and it was not till the 2d of July that the other bill was taken up and satisfied by the defendant to Favell & Bousfield, who were all the time ignorant of the agreement between Parry and the defendant. But, after the plaintiff had become the holder of one of the bills for a valuable consideration and without notice, the defendant could not discharge himself from it under the equity of an agreement known only to himself and Parry, by making satisfaction for the other bill, without any inquiry after this, in order to learn whether it had been negotiated. [LORD ELLENBOROUGH, C. J. Favell & Bousfield had no authority from their principal to pass the

¹ 7 T. R. 423.

bill at all to the plaintiff. The two bills were remitted to them as agents for Parry to receive payment of them, and out of the money when received to make a certain payment to the plaintiff. BAYLEY, J. They altered the situation of their principal by handing over the bill to the plaintiff; for though his name was not upon it, yet if the plaintiff could recover upon it against Ham, that would make Parry liable over to Ham, which he did not contemplate when he put the bills in the hands of his agents for the purpose which he directed.] The agreement was executory till after the time when the plaintiff became the holder of this bill; but, if the payment of one of the bills could be a satisfaction for the other, the defendant ought not to have satisfied the one in the hands of Parry's agents without inquiring for the other: for, if the option rested with him of satisfying which he pleased, it was in his power to make his bargain with the holder of either to defeat the claim of the other.

Copley, contra, was stopped by the court.

LORD ELLENBOROUGH, C. J. The plaintiff took this bill after the dishonor of it by the drawees: he therefore took it with all the existing infirmities belonging to it at the time. What, then, was its infirmity in this case? Parry, the original holder in America, had sent it, together with another bill of the same tenor, to his correspondents here, with directions not to pass it, but to get it accepted and receive the money when due, and to make a payment thereout to the plaintiff, to whom he was indebted. The money when received to Parry's use was to be distributed in part to the plaintiff, and for that purpose the bill was put into middle hands. But the period of application never arrived, because the period of payment of the bill never arrived, it having been dishonored when presented. In the mean time, it appears that an agreement was entered into in America between Parry, the owner of both the bills, and Ham, the defendant, virtually declaring that these were duplicates in fact of the same security, and that the payment of one should be taken in satisfaction of both: and, even if this had not been so intended originally, there was nothing in the way of making such an agreement between the parties themselves, who were interested in the bills at the time; for it must be recollected that Favell & Bousfield had no authority from Parry to pass the bills. Then the plaintiff, who took it from them after the dishonor, took it with its infirmities, and subject to this agreement between Parry, the then owner, and the defendant; whereby payment of one of the bills was agreed to be received as payment of both. Then, payment having been made by the defendant of the other bill which remained in the hands of Favell & Bousfield, this bill also is satisfied, and the plaintiff cannot recover upon it. Both the points therefore reserved

at the trial are against the plaintiff: for the agreement stated was properly received in evidence; and the plaintiff took the bill after the dishonor, subject to all its infirmities, one of which was the agreement between Parry and Ham, which bound the bill in question.

GROSE, J., was of the same opinion.

BAYLEY, J.¹ Favell & Bousfield, the agents of Parry, were the same as Parry himself for this purpose; and it is a known rule that whoever takes a bill after its dishonor takes it with all the infirmities belonging to it. The defendant originally lent his indorsements on these bills to Clark, by whom they were paid over to Parry; and afterwards Parry consented, and agreed with the defendant that, on payment of one of the bills, the other should also be given up to him. At that time, Parry had fair reason for believing that he had authority to make such an agreement, because he had transmitted the bills to his correspondents, not to pass them away, but to receive the money upon them from the drawees, and pay over a part to the plaintiff when received; but the money never was received by Parry's agents, and while the bills were still in their hands Parry made the agreement with the defendant which bound those bills.

*Postea to the defendant*²

BURROUGH v. MOSS, GENT, ONE, &C.

IN THE KING'S BENCH, HILARY TERM, 1830.

[Reported in 10 Barnewall & Cresswell, 558.]

ASSUMPSIT on a promissory note dated the 5th of February, 1826, made by the defendant, whereby he promised to pay John Fearn, by the name of Mrs. Rachel Fearn, or order, £150, with interest, nine months after notice in writing; and indorsed by J. Fearn to the plaintiff. Plea, the general issue. At the trial before Burrough, J., at the spring assizes for Derby, 1829, it appeared in evidence that the defendant had been employed as an attorney by Mrs. Rachel Harrison, and had lent £200 of her money at interest to one Birch, who gave Mrs. Harrison a promissory note for it. In July, 1825, Mrs. R. Harrison intermarried with John Fearn, who in February, 1826, requested the defendant to obtain payment of the £200 from Birch. The defendant said Birch was a client of his, and that he did not wish him to be pressed for the

¹ Le Blanc, J., was absent from indisposition.

² Andrews v. Pond, 13 Pet. 65, 79; Fowler v. Brantly, 14 Pet. 818, Rounsavel v. Sch. lfeld, 2 Cr. C. C. 139, accord. — ED.

money; and, in order to prevent Fearn from suing Birch, he (Moss) paid £50 on account of the note, and gave his own note for £150, and made it payable to Mrs. R. Fearn nine months after notice. On the 21st of April, 1826, J. Fearn gave the defendant a written notice to pay off the note at the expiration of nine months from that time. Moss, at the expiration of the time, paid £50 and the interest then due, but no more; and in March, 1827, J. Fearn and his wife both indorsed the note to the plaintiff, who advanced £100 on it, and commenced this action against Moss. The defendant claimed a right to set off a sum of £51, alleged to have been due to him from Mrs. Fearn before her marriage, £28 for business transacted for Fearn since the marriage, and £15 said to have been paid on account of the note, besides the £50 and interest before mentioned; but the jury found that this sum of £15 was not paid on account of the note. The learned judge directed the jury to find a verdict for the plaintiff for the amount due on the note, and gave the defendant leave to move to reduce the damages, if the court should think that either of the sums of £51, £28, or £15 ought to be allowed. A rule *nisi* was obtained for that purpose in Easter term, 1829, and at the sittings *in banc* before this term.

Balguy and *N. R. Clarke* showed cause. The defendant had no right to set off either of the sums of £51 or £28. The sum of £15 was disposed of by the jury. The £51 was a debt due from the wife *dum sola*. The note, although in form given to Mrs. Fearn, was in law given to her husband, and enured to his benefit. The defendant was indebted to him on the note; and, if he (Fearn) had sued, the debt due from the wife before marriage could not have been set off. Then as to the sum of £28. If the action had been brought by Fearn, no doubt it might have been set off; but the right of the defendant to avail himself of that claim in this action rests on the supposed applicability of the rule of law that the indorsee of a bill or note, when overdue, takes it subject to all its equities. But that is inapplicable for two reasons: first, there was nothing on the face of the note to show that it was overdue at the time when the plaintiff became indorsee; and, secondly, the right of set-off in this case between Fearn and the defendant was wholly collateral to and independent of the note transaction, and the rule applies only where the right of set-off or other equity arises out of the note transaction itself. None of the decisions — *Brown v. Davis*, *Boehm v. Stirling*,¹ *Charles v. Marsden* — warrant a broader rule than that; and although in *Brown v. Davis* Buller, J., stated that he had ruled at *Nisi Prius*, in a case of Banks

¹ 7 T. R. 423.

v. Colwell, that the maker of a promissory note being sued by a person who became indorsee after it was due was entitled to set up the same defence that he might have done against the original payee, the defence then in question arose out of the very transaction in which the note was given, and went to the consideration for the note. The right of set-off now insisted on depends on the statute of set-off, and that only applies between the parties who have mutual demands. It would be very hard to involve the plaintiff in the investigation of accounts between third persons. [BAYLEY, J. In *Collenridge v. Farquharson*,¹ the state of such accounts was examined.] That is true; but it was in order to see what sum the bill was originally intended to secure.

Adams, Serjt., contra. This is an attempt to evade the statute of set-off, which will never be available against the holder of a note if he can, by indorsing it when overdue, give the indorsee a right independent of the set-off. In this case, the demands for £51 and £28 might have been set off, if Fearn had sued on the note. The sums due on the note, on the one hand, and for those demands, on the other, were mutual debts. If Mrs. Fearn had survived her husband, she might have sued on the note; and then it is clear that the debt due from her before marriage might have been set off. So, also, if Fearn and his wife had joined in bringing an action on the note, the debt due from her before marriage might have been set off; and, as the money received would enure to the benefit of the husband, the debt due from him might also have been set off. But the indorsee of this note, taking it when overdue, stands in the same situation; for the indorsement was by both husband and wife. [BAYLEY, J. That, in legal effect, was the indorsement of the husband only.] *Philliskirk v. Pluckwell*² shows that husband and wife may join in an action on a note given to the wife during her coverture; and, if so, a debt due from her before marriage ought to be allowed to be set off.

BAYLEY, J. On behalf of the defendant, it has been insisted that the defendant is entitled to set off two sums, one of which, £51, was due to him from Mrs. Fearn before her marriage. As to that, I am of opinion that he has not a right of set-off. The action was brought on a note given to Mrs. Fearn during her coverture, not by a person who was her debtor before her marriage, but by a party who came in aid of the debtor. The form of the security gave the husband a right to treat it as joint property or as several; and, if he chose to treat it as several, he might deal with it as his own; and the consequence of his so treating it would be to let in, by way of set-off to any claim by him, any debts due from him. If, on the other hand, he elected to treat it as a

¹ 1 Stark. N. P. C. 259.

² 2 M. & S. 393.

joint property of himself and his wife, in her right, he might let in debts due from her in her own right; but it is clear that both classes of debts could not be let in. It appears that, in the present case, he elected to treat the note as his separate property; for he indorsed it over to the plaintiff. That mode of dealing with it leads to the same consequences as if the note had been given to him alone; and, consequently, the debt due from his wife before her marriage cannot be set off. As to the other sum of £28, due from Fearn alone, I should wish to consider the case further before I give my opinion; for, although it might have been set off had Fearn sued on the note, yet the cases have not yet gone the length of establishing that such a set-off, not arising out of the bill or note transaction, can be made available against an indorsee, even when the bill or note is overdue at the time of the indorsement.

LITLEDALE, J. Supposing the statute of set-off to apply to this case (which I think it does not), it is clear that the debt due from Fearn can alone be set off; for nothing beyond that could have been set off, had he brought an action on the note. If he had sued jointly with his wife, I do not think it by any means clear that the debt due from her *dum sola* could have been set off.

PARKE, J. When the question as to the set-off was first mentioned, I thought that it must be allowed. But I now entertain doubts; for no decision has yet gone to that extent. If there is an agreement, either express or implied, affecting the note, that is an equity which attaches upon it, and is available against any person who takes it when overdue; but it does not thence follow that a right depending entirely on the statute of set-off is applicable to such a state of things. The result of the contract entered into by the maker of this note is that the husband might, if he thought fit, give his wife an interest; or he might, as was the fact, dissent, and make the note his own. If, therefore, any set-off is to be allowed, it must be confined to the debt of £28 contracted by him after the marriage.

Cur. adv. vult.

The judgment of the court was now delivered by

BAYLEY, J. This was an action on a promissory note made by the defendant, payable to one Fearn, and by him indorsed to the plaintiff after it became due. For the defendant, it was insisted that he had a right to set off against the plaintiff's claim a debt due to him from Fearn, who held the note at the time when it became due. On the other hand, it was contended that this right of set-off, which rested on the statute of set-off, did not apply. The impression on my mind was that the defendant was entitled to the set-off; but, on discussion of the matter with my Lord Tenterden and my learned brothers, I agree with

them in thinking that the indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters. The consequence is that the rule for reducing the damages in this case must be discharged.

Rule discharged.¹

¹ *Whitehead v. Walker*, 10 M. & W. 696; *Nat. Bank v. Texas*, 20 Wall. 89 (*semble*); *Robertson v. Breedlove*, 7 Port. 541; *Tuscumbia R.R. v. Rhodes*, 8 Ala. 224; *Robinson v. Lyman*, 10 Conn. 30; *Stedman v. Jillson*, 10 Conn. 55; *Culver v. Parish*, 21 Conn. 412; *Tinsley v. Beall*, 2 Ga. 134; *Wilkinson v. Jeffers*, 30 Ga. 153; *Hawkins v. Shoup*, 2 Ind. 342; *Shipman v. Robbins*, 10 Iowa, 208; *Way v. Lamb*, 15 Iowa, 79; *McNitt v. Helm*, 83 Iowa, 342; *Richards v. Daily*, 34 Iowa, 427; *Annan v. Houck*, 4 Gill, 325, 332; *Renwick v. Williams*, 2 Md. 356; *Gullett v. Hoy*, 15 Mo. 399; *Mattoon v. McDaniel*, 34 Mo. 138; *Arnot v. Woodburn*, 35 Mo. 99; *Cumberland Bank v. Hann*, 3 Harr. 222; *Hughes v. Large*, 2 Barr, 103; *Long v. Rhawn*, 75 Pa. 128; *Young v. Shriner*, 80 Pa. 463; *Trafford v. Hall*, 7 R. I. 104; *Britton v. Bishop*, 11 Vt. 70; *Walbridge v. Kibbee*, 20 Vt. 543; *Davis v. Miller*, 14 Grat. 1 (*semble*), *accord*.

Fossitt v. Bell, 4 McL. 427 (*semble*); *Sargeant v. Kellogg*, 10 Ill. 273; *Lord v. Favorite*, 29 Ill. 149; *Burnham v. Tucker*, 18 Me. 179; *Wood v. Warren*, 19 Me. 23 (*semble*); *Sargent v. Southgate*, 5 Pick. 312 (overruling *Holland v. Makepeace*, 8 Mass. 418); *Stockbridge v. Damon*, 5 Pick. 223; *Braynard v. Fisher*, 6 Pick. 355 (*semble*); *Ranger v. Cary*, 1 Met. 369 (*semble*); *McDuffie v. Dame*, 11 N. H. 244; *Ordiorne v. Woodward*, 39 N. H. 541; *Cross v. Brown*, 51 N. H. 486. (But see *Chandler v. Drew*, 6 N. H. 469); *O'Callaghan v. Sawyer*, 5 Johns. 118; *Ford v. Stuart*, 19 Johns. 342; *Driggs v. Rockwell*, 11 Wend. 504; *Miner v. Hoyt*, 4 Hill, 193 (*semble*); *Johnson v. Bridge*, 6 Cow. 693; (5 Wend. 342, s. c., *contra*, if not overruled, is repugnant to 3 N. Y. Rev. St. (6th ed.) 480, § 112); *Haywood v. McNair*, 3 Dev. 231; 2 Dev. & B. 283, s. c.; *Turner v. Beggarly*, 11 Ired. 331 (*semble*); *Cain v. Spann*, 1 McMull. 258 (*semble*), *contra*.

In those jurisdictions, however, where a defendant is permitted to plead a set-off against the transferee of an overdue bill or note, the privilege is of course confined to debts due to the defendant at the time of the transfer. *Patterson v. Ather-ton*, 3 McL. 147; *Baxter v. Little*, 6 Met. 7; *Linn v. Rugg*, 19 Minn. 181; *Johnson v. Bloodgood*, 2 Cal. Cas. 303; 1 Johns. Cas. 51, s. c.; *Bank v. McCracken*, 18 Johns. 493; *Chamberlain v. Gorham*, 20 Johns. 144; *Cain v. Spann*, 1 McMull. 258; *Williams v. Hart*, 2 Hill (S. Ca.), 483; *Ritchie v. Moore*, 5 Munf. 388; *Davis v. Miller*, 14 Grat. 1. Furthermore, the right of set-off applies only to debts due to the defendant from the payee, and does not extend to debts due from any intermediate holder between the payee and the plaintiff. *Vinton v. Crowe*, 4 Cal. 309; *Hayward v. Stearns*, 39 Cal. 58; *Nixon v. English*, 3 McC. 549; *Perry v. Mays*, 2 Bail. 354. But see *Wood v. Warren*, 19 Me. 23 (*semble*); *Bond v. Fitzpatrick*, 4 Gray, 89 (*semble*), *contra*. — ED.

STEIN v. YGLESIAS.

IN THE EXCHEQUER, MICHAELMAS TERM, 1834.

[Reported in 3 Dowling, 252.¹]

THIS was an action on a bill of exchange by the indorsee against the acceptor. The defendant pleaded that the bill was accepted for the accommodation of Douglas, the payee, and without any consideration; and that it was indorsed to the plaintiff after it became due. The plaintiff demurred. The defendant also pleaded that the bill was indorsed to the plaintiff after it became due, and that the payee at the time of the indorsement was indebted to the defendant in a larger sum than the amount of the bill: to this, also, the plaintiff demurred specially.

PARKE, B. The last plea is bad according to *Burrough v. Moss*. As to the first plea, if the bill was accepted for accommodation after it became due, there is no reason why it should not be good in other persons' hands. If before, there might have been an implied understanding not to circulate it after it was due. The plea may be amended by inserting that the bill was accepted before it became due, and the agreement, if the facts warrant it. *Judgment for the plaintiff.*

BROOKS AND OTHERS, ASSIGNEES OF CHARLES EVANS, A
BANKRUPT, v. MITCHELL.

IN THE EXCHEQUER, NOVEMBER 18, 1841.

[Reported in 9 Meeson & Welsby, 15.]

TROVER, to recover a promissory note for £1,000, dated 24th December, 1824, made by one Lens, payable on demand, with interest, to the bankrupt, Charles Evans, or his order. The first count was upon the possession of the bankrupt, the second on the possession of the plaintiffs as assignees. Pleas: 1st, not guilty; 2dly, that the bankrupt was not possessed of the note, *modo et forma*; 3dly, that the note was not the property of the plaintiffs as assignees, *modo et forma*; 4thly, that before the supposed conversion, and before the bankruptcy, to wit, on the 12th of March, 1836, the said Charles Evans indorsed and

¹ 1 C. M. & R. 565, s. c. — Ed.

delivered the said note to one Royle, who afterwards, to wit, on the 16th of January, 1838, indorsed and delivered the same to the defendant, *bona fide*, and for a good and valuable consideration, and without notice of any right or title in the plaintiffs as assignees of the said Charles Evans. Verification. The plaintiff joined issue on the first three pleas, and for replication to the last, admitting the indorsement and delivery in fact by Evans to Royle, and by Royle to the defendant, traversed the allegation that the indorsement and delivery by Royle to the defendant was *bona fide*, and for a valuable consideration, and without notice of any right or title of the plaintiffs as assignees. Issue thereon.

At the trial before Wightman, J., at the last Liverpool assizes, the following facts appeared. The bankrupt, Evans, who had been a banker in Manchester, having advanced to Lens, who was his foster brother, the sum of £1,000, received from him, as a security for its repayment, the promissory note in question, which bore date the 24th of December, 1824. Evans had debited Lens in account with the interest half-yearly, down to the 25th of December, 1835. On the 12th of March, 1836, Evans indorsed the note to Royle, and, as the plaintiffs alleged and endeavored to prove, without any consideration. In August of the same year, Evans became a bankrupt. On the 16th January, 1838, Royle indorsed and delivered the note to the defendant, and in the March following himself became bankrupt. A dividend of 5s. 6d. in the pound was paid under the fiat against Evans, and of 4s. 6d. in the pound under that against Royle; but no mention was made of the note in question until June, 1839, when the defendant made application to Lens, the maker, for payment of interest upon it; and, on Lens's death in the following August, the defendant commenced an action against his widow, to recover the amount of it. Upon these facts, the learned judge directed the jury to consider whether the note was indorsed by Evans to Royle before the bankruptcy of Evans; and, if it was so indorsed, whether Royle gave a valuable consideration for the indorsement; and, if he did not, whether the defendant gave value for the note to Royle, without knowledge that Royle had given no value to Evans. The jury found that the note was indorsed to Royle by Evans before his bankruptcy, and that the defendant gave value for it to Royle; and, as to the question whether Royle gave value for it, they said there was no sufficient evidence to the contrary. The learned judge thereupon directed a verdict for the defendant.

Wortley now moved for a new trial, on the ground of misdirection. The finding of the jury is incomplete, for they have not found in terms that Royle gave any consideration for the note; and all the

evidence given in the cause went to show that he gave none. That being assumed to be the case, if the note was overdue when it came to the hands of the defendant, he could have no better title than Royle, and no right to retain the note as against the assignees of Evans. Now, the note was overdue when it came to the hands of the defendant, for it was a note made in the year 1824, payable on demand, on which it appeared no interest had been paid for three years; and, under these circumstances, the demand of payment by the defendant was not made within a reasonable time. The rule is laid down in Bayley on Bills, p. 232 (5th edit.), that "a bill or note, payable on demand, must not be kept locked up; if it be, the loss will fall upon the holder." [PARKE, B. The author is speaking there of the liability of collateral parties. The case of a check is quite different from that of a promissory note. A check ought to be presented speedily; but a promissory note payable on demand circulates for years.] The foundation of the rule just referred to is that the delay in presentment raises an inference of fraud, which ought therefore to put the party who takes the instrument under such circumstances upon his guard. Bayley on Bills, 157; *Taylor v. Mather*.¹ That applies equally to a note payable on demand as to any other negotiable instrument. A party taking a note under such circumstances takes it subject to the same consequences as a party who takes an overdue note payable after date. [PARKE, B. The non-payment of interest for three years was the only circumstance tending to have put the defendant upon his guard, because a promissory note payable on demand is current for any length of time.] It is settled law that a note payable on demand is payable immediately; and, therefore, that the Statute of Limitations runs upon it from the date of the note, and not from the time of the demand. *Christie v. Fonsick*.² *Barough v. White*³ shows, indeed, that a note payable on demand cannot be considered as overdue at the time of the indorsement of it; but this case goes much further, since here the note was made in 1824, and no demand of interest, or of payment of the principal, was made by any party from 1835 till 1839.

PARKE, B. I cannot assent to the arguments urged on behalf of the plaintiffs. If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a check, which is intended to be presented speedily.

¹ 3 T. R. 83 n.

² 1 Selw. N. P. 141.

³ 4 B. & C. 325; 6 D. & R. 379.

The rest of the court concurred, and on this ground the rule was therefore *Refused*.¹

STURTEVANT v. FORD.

IN THE COMMON PLEAS, APRIL 22, 1842.

[Reported in 4 Manning & Granger, 101.]

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange drawn by J. Ayres for £243 7s. 8d., dated 17th of August, 1838, payable in London, for value received in iron.

Fourth plea, that the bill was accepted by the defendant before the same became due or payable, at the request and for the accommodation of Ayres, and without any value or consideration whatever for the acceptance thereof or for the payment thereof; and that the said bill was so indorsed to the plaintiff as in the said declaration mentioned, two years after the same had become due and payable, according to the tenor and effect thereof. Verification.

Special demurrer, assigning for cause that it is not averred or shown in the said plea that the defendant accepted the said bill upon the terms that the same should not be indorsed or negotiated by Ayres after it became due; that the said plea does not allege that the plaintiff had notice of the premises or any of them in that plea mentioned, before or at the time the said bill was indorsed to him, or that the defendant ever required Ayres not to indorse the bill after it became due.

Joinder in demurrer.

Channell, Serjt., in support of the demurrer. The plea does not state that the plaintiff is not a holder for value, and it must be therefore taken upon the record that the plaintiff is a holder for value. Neither does the plea state that, before the plaintiff became the indorsee of the bill, he had notice that the bill was drawn for the accommodation of the drawer and without value. It does not show that the drawer was under any restriction as to indorsing a bill after it became due. The question to be decided upon the demurrer is whether a holder for value, taking a bill which is overdue, without notice that the instrument is an accommodation acceptance, is not entitled to recover. [CRESSWELL, J. The question is whether an indorser can give a better title than he himself has.] In *Charles v.*

¹ *Heywood v. Watson*, 4 Bing. 496; *Barough v. White*, 4 B. & C. 325; *Gascoyne v. Smith*, M'Cle. & Y. 338; *Cripps v. Davis*, 12 M. & W. 159, 165, *accord.* — ED.

Marsden, it was held not to be a sufficient defence to plead that the bill was accepted for the accommodation of the drawer without consideration, and indorsed to the plaintiff after it became due. In *Stein v. Yglesias*, it was pleaded that the bills were accepted for the accommodation of the indorser, and without any consideration for such acceptance. The plea was held to be bad, on the ground that it did not state that the bill had been accepted before it became due, and that there was nothing to show that the defendants intended to limit the negotiation of the bill to the time before it became due. The plaintiff would have his remedy over against the party accommodated. It lay on the defendant to show that the power of indorsing, and thereby raising money, was limited to the period during which the bill was running. The defendant is not entitled to notice of non-payment. *Tinson v. Francis*,¹ which will be relied on for the defendant, was a case of gross fraud.

Talfourd, Serjt., contra. This is a point of considerable importance. In *Tinson v. Francis*, it was held that an indorsee of a promissory note for value, who had received the note after it became due from an indorser who had not given value, could not sue the maker.

In *Brown v. Davies*, where a promissory note was indorsed to the plaintiff after it became due, it was held that the maker was entitled to go into evidence to show that the note was paid, as between him and the payee. In that case, Buller, J., says: "There is this distinction between bills indorsed before and after they become due. If a note indorsed be not due at the time, it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. Generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him." "I am speaking of cases where the note has been indorsed after it became due, when I consider it as a note newly drawn by the person indorsing it."

The law as laid down by Buller, J., is not, it is true, adopted to its full extent by Lord Kenyon, who was not prepared to go the same length where the indorsee cannot be fixed with notice of the dishonor of the note or bill. But the contract and the understanding upon the drawing of a bill of exchange is, *prima facie*, that the party shall have the benefit of the time during which the bill has to run, and not for an indefinite period.

TINDAL, C. J. Upon these pleadings, the plaintiff must be taken to be a holder for value, without notice of any defect in the title of his

¹ 1 Campb. 19.

indorser. Upon the authority of the cases,—without saying what would be my opinion if the question were *res integra*,—I think the plaintiff is entitled to judgment. In *Charles v. Marsden*, the plea stated that, at the time of the indorsement, the plaintiffs knew that the bill had been accepted by the defendant for the accommodation of Atkinson, the payee: that, therefore, was a stronger case than the present. I do not see much force in the argument that the circumstance of the bill being overdue when it is indorsed puts the indorsee in the same position as the indorser, who, in the case of a bill drawn for his accommodation, cannot sue at all. I do not think that the holder is precluded from suing in all cases of accommodation bills indorsed after the time at which they purport to be payable. Nothing *dehors* the bill, as payment, &c., ought, I think, to affect an indorsee for value. In *Stein v. Yglesias*, it was said, without disapprobation on the part of the court, that the defendant was bound to allege want of consideration for the indorsement.

COLTMAN, J. I am of the same opinion. In *Charles v. Marsden*, Lawrence, J., says: “Where a party has obtained the bill by fraud, or where there is any prejudice to the drawer, those cases apply; but, unless in instances of this kind, the acceptor is not relieved. This case may fall within some general expressions which have been used by the court in giving judgment, but those expressions are always to be taken with reference to the cases to which they were applied. One was a case of clear fraud, another was a smuggling transaction. In the present case, it is to be supposed that the party persuades a friend to accept a bill for him, because he cannot lend him money. Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it is due? For there is no reason why a bill may not be negotiated after it is due, unless there was an agreement for the purpose of restraining it. But, if there had been such an agreement, it should have been stated in the plea, and it might then have been a defence; but that is not so here. This bill, then, must be presumed to be given, in order that the party may raise money on it in the ordinary way. I see nothing in the transaction prejudicial to the acceptor, and the plea is bad in substance.”

ERSKINE, J. I am of the same opinion. It must be taken here that the plaintiff was a holder for value. The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been so averred. A jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be

an inference of law: it should therefore have been made the subject of an averment. In the absence of such an averment, the question is whether the mere fact of the bill being an accommodation bill prevents it being negotiable after it becomes due. It is said that a bill, indorsed after it becomes due, is taken by an indorsee subject to all the equities. The question is whether the matter of defence set up is an equity which attaches to the bill. The drawer of this bill could not sue the acceptor. If the plaintiff has given consideration, there is no equity to attach to him. Then is this an equity with which the bill is incumbered? It seems to me that no equity attaches to the bill, because it was placed in the hands of the drawer for the very purpose of raising money. Looking at the cases of *Charles v. Marsden* and *Stein v. Yglesias*, I think the plaintiff's right to recover is not concluded by the facts disclosed in this plea.

CRESSWELL, J. I am of the same opinion. Had this been *res integra*, I am not prepared to say that I should have come to the same conclusion. I should have thought it a case of doubt. By the law-merchant, an indorsement may give to the indorsee a better title than the indorser had. It is said that the indorsee of a bill which is overdue takes it subject to all the equities: perhaps a better expression would be that he takes the bill subject to all its equities. That brings it to the question whether this is an equity which attaches to the bill. In *Charles v. Marsden*, the court said that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it. *Atwood v. Crowdie*¹ is consistent with the law as laid down in *Charles v. Marsden*.

*Judgment for the plaintiff.*²

OULDS v. HARRISON.

IN THE EXCHEQUER, DECEMBER 18, 1854.

[*Reported in 10 Exchequer Reports, 572.*]

DECLARATION on a bill of exchange, drawn by John Bennett upon and accepted by the defendant, and indorsed by J. Bennett to the plaintiff.

Second plea: that, before the accepting of the bill, the defendant

¹ 1 Stark. N. P. C. 483.

² *Atwood v. Crowdie*, 1 Stark. 483; *Carruthers v. West*, 11 Q. B. 143; *Parr v. Jewell*, 18 C. B. 909; 16 C. B. 684, s. c.; *Ex parte Swan*, L. R. 6 Eq. 344; *Wilkie v. Wilson*, Court of Session, November 30, 1811; *Renwick v. Williams*, 2 Md. 356; *Davis v. Miller*, 14 Gratt. 1 (*semble*), *accord.* — ED.

authorized J. Bennett, in his J. Bennett's own name, but on account of the defendant, to lay bets on horse races; and J. Bennett, in pursuance of such authority, laid bets on horse races, and lost them; and the defendant says that J. Bennett afterwards, voluntarily, and without the request of the defendant, paid to the persons to whom he so lost such bets divers moneys on account of the moneys which he had so lost; and the defendant says that the bets respectively were contracts by way of wagering; and the defendant says that the said bill was afterwards so made and accepted as in the declaration mentioned, for and on account and towards repayment to J. Bennett of the moneys which he had so paid; and the defendant says that there never was any other consideration for the acceptance; and the defendant says that there was no consideration for the indorsement of the said bill to the plaintiff.

The third and fourth pleas were similar: the one alleging that the bill was indorsed to the plaintiff after it became due; the other, that the plaintiff at the time the bill was indorsed to him had notice of the premises.

Fifth plea: that, after the day on which the bill became due, and before J. Bennett indorsed it to the plaintiff, and while J. Bennett was the holder and owner of the bill, he then being indebted to the defendant in a sum exceeding the amount of the bill and the interest thereon from the time when the same became due, the defendant elected to set off against the bill an equivalent part of the debt so due to the defendant from J. Bennett, and gave notice of such his election to J. Bennett; and the defendant says that the said debt due from J. Bennett at the commencement of this suit was and is still due and unpaid to him; and the defendant says that J. Bennett, so as in the declaration mentioned, indorsed the bill to the plaintiff after the day on which the bill became due, and after J. Bennett had such notice as aforesaid, and while the said debt was so due to the defendant from J. Bennett; and the defendant says that he was not, at the time when he so elected to make the said set-off, or at any time afterwards, indebted to J. Bennett on any other account than on the bill; and the defendant says that the plaintiff never, before J. Bennett had such notice, acquired or had any title or right to have the bill indorsed to him.

Sixth plea: that after the day on which the bill became due, and before J. Bennett indorsed it to the plaintiff, and while J. Bennett was the holder and owner of the bill, he was indebted to the defendant in a sum exceeding the amount of the bill and the interest thereon from the time when the same became due; and whilst the said sum of money owing from J. Bennett to the defendant was due and unpaid,

and after the bill became due, J. Bennett, in order to deprive the defendant of his right of set-off in respect of the aforesaid sum of money then owing from J. Bennett to the defendant, did, in order to defraud the defendant, and in collusion with the plaintiff, indorse the bill to the plaintiff, in order to enable the plaintiff to sue the defendant on the bill, without any consideration for the said indorsement; and that the plaintiff sues in this action merely as the agent of J. Bennett and in collusion with him; and that the sum of money so due as aforesaid from J. Bennett to the defendant hath not, nor hath any part of it been paid, but is still due. And the defendant says that he was not, at the time when the bill was so indorsed to the plaintiff, or at any other time afterwards, indebted to J. Bennett on any other account than on the bill.

Demurrers, and joinders therein.

Hance argued in support of the demurrers (December 4). The second, third, and fourth pleas are clearly bad. The 8 & 9 Vict. c. 109, § 18, merely renders wagering contracts incapable of being enforced: therefore, there was nothing illegal in Bennett's making the bets on account of the defendant; and the direction to make them contained an implied authority to pay them, if lost. Then the defendant, by afterwards giving a bill for the amount so paid, in effect ratified the payment. [PARKE, B. Those pleas are certainly bad.] The fifth plea is also bad. It does not show that the defendant had any right of set-off, since no action had been brought by Bennett against him. Moreover, the defendant was not bound to set off the debt; and it is consistent with every allegation in the plea that the defendant might have recalled his election, and refused to set off before the bill was indorsed to the plaintiff. [PARKE, B. The plea only states that the defendant elected to set off the debt, and gave Bennett notice of his election; but that is of no avail, unless both parties agreed to it.] The sixth plea is bad, since it does not show that the defendant intended to set off the debt; and, consistently with every allegation in the plea, he may, in fact, have refused to do so. If, however, this is substantially Bennett's action, the defendant is not deprived of his right of set-off; for the indorsee of an overdue bill takes it subject to all the equities which attached to the bill in the hands of the holder when it became due. *Whitehead v. Walker*,¹ *Burrough v. Moss*.

J. Addison, contra. The second, third, and fourth pleas are good. There was no consideration for the acceptance or indorsement. By the 8 & 9 Vict. c. 109, § 18, all wagering contracts are absolutely void. It is clear, therefore, that the winner could not have recovered the bet, and consequently the payment by Bennett was a payment in his own

¹ 10 M. & W. 696.

wrong. It is argued that the defendant, by giving the bill, ratified the payment; but the doctrine of ratification only applies where the act is done by a person as agent and for the benefit of another. [PARKE, B. Do not the words "on account of him the defendant" mean "as his agent"? If the defendant, instead of giving a bill, had paid the money, could he have recovered it back? Then, having given a bill, that is a payment by anticipation.] If a person makes another his agent to purchase goods, that does not necessarily constitute him agent to pay for them. So here Bennett might have been the defendant's agent to lay the bets, but not to pay his losses. [PARKE, B. If a person gives a bill for a debt which he is not bound in law to pay, as for instance on a guarantee not in writing, there is good consideration for the bill: it is, in truth, a payment at a future day. It has, indeed, been held that a gift is not binding, unless it be by deed, or the subject of the gift be actually delivered; but, if the point were *res nova*, it would perhaps be decided differently.] Then, with respect to the fifth plea. The election by the defendant to set off the debt due to him from the drawer of the bill was, as between them, tantamount to payment. *Goodall v. Ray*¹ decided that an indorsee of a promissory note, not overdue, but the amount of which is exceeded by a cross demand of the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note subsequent to such notice, although the note is a distinct transaction between the original parties. [PARKE, B. It cannot be said that a mere notice of set-off between the maker and acceptor of a bill before it is due will restrict the negotiability of the instrument. I pointed out, in *Whitehead v. Walker*,² that there must be some mistake in the report of the case of *Goodall v. Ray*.] The law of set-off is founded on the doctrine of the civil law as to compensation: Pothier on Obligations, p. 3, c. 4; and the same principles ought to govern its application. Unless a notice of election to set off a debt is binding, this inconvenience will ensue, that the party to whom the older debt is due must bring an action, in order to prevent the operation of the Statute of Limitations; and, if he does so, he is met by the set-off, and must pay the costs of the unsuccessful action. Then, with respect to the sixth plea, it shows that the drawer, acting in collusion with the plaintiff, fraudulently indorsed the bill, in order to deprive the defendant of his right of set-off. Such a transaction is within the spirit, if not within the letter of the 13 Eliz. c. 5. In *Watkins v. Bensusan*,³ which was an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that before and at the time of the indorsing of the bill by the drawer

¹ 4 Dowl. P. C. 76.² 10 M. & W. 696.³ 9 M. & W. 422.

he, the drawer, was indebted to the defendant in a sum of money exceeding the amount of the bill; and that after the bill became due, in order to deprive the defendant of his right of set-off in respect of the debt, he fraudulently indorsed the bill, to enable the plaintiff to sue the defendant on the bill, and without any consideration for the indorsement: and that was held to be an issuable plea. If the drawer had sued upon the bill, it is clear that the defendant might have set off the debt: then his situation is altered by the fraudulent transfer. At all events, this is a good plea of set-off, within the principle of the decision in *Carr v. Hinchliff*.¹ [MARTIN, B. If this amounts to a plea of set-off, it ought to have the effect of extinguishing the debt due from the drawer; but he still remains liable.]

Hance, in reply, referred to *Isberg v. Bowden*.²

PARKE, B. We entertain no doubt about any of the pleas except the last. With respect to the three first, the acceptance by the defendant of the bill of exchange for moneys paid by the drawer for bets made in his own name, but in reality for the defendant, was a payment on account. It is true that the defendant was not bound in law to repay the drawer; but, since he chose to give a bill, there is good consideration for its payment. If, instead of a bill, the defendant had given a sum in cash or a bank-note, it is clear that he could not have recovered it back. It is, in effect, the same with a bill. There is money paid on the defendant's account, which, by giving the bill, he acknowledges to be a payment on his account, and that is ample consideration for the bill.³ Then, as to the fifth plea, notice of the existence of a set-off does not take the case out of the authority of *Burrough v. Moss*, which decided that the indorsee of an overdue bill does not take it subject to claims arising out of collateral matters, such as a set-off, which is only a convenient mode of settling mutual accounts. The only point upon which we entertain any doubt is whether the sixth plea shows an indorsement of the bill under such circumstances of fraud as to give the defendant the same right of set-off against the plaintiff as he had against the drawer of the bill. On that point we will take time to consider. *Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE, B. The only question remaining for decision in this case is the sufficiency of the sixth plea. It is in these terms (his Lord-

¹ 4 B. & C. 547.

² 8 Exch. 852.

³ *Stephens v. Wilkinson*, 2 B. & Ad. 326 (*semble*); *Flight v. Reed*, 1 H. & C. 703; *La Touche v. La Touche*, 3 H. & C. 576; *Mather v. Maidstone*, 18 C. B. 273; *Bennett v. Ford*, 47 Ind. 264; *Holmes v. Williams*, 10 Paige, 326, *accord*.

Southall v. Rigg, 11 C. B. 481 (*semble*); *Didlake v. Robb*, 1 Woods. 680; *Holden v. Cosgrove*, 12 Gray, 216, *contra*. — ED.

ship read the plea, and proceeded): A plea, not substantially different from this, was held by this court to be an issuable plea, in the case of *Watkins v. Bensusan*,¹ where judgment had been signed for want of a plea, after the defendant had given the usual undertaking to plead issuably. But in such cases it is not usual to allow judgment to be signed, unless the plea is manifestly bad, which this plea is not, there certainly being a fair question about it. We think, upon full consideration, that the plea is bad.

It must be considered as entirely settled by the case of *Burrough v. Moss* that the indorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; as, for instance, the payment or satisfaction of the bill itself to such holder, or where the title of such holder was only to secure the balance of an account due, as seems to have been the case in *Collenridge v. Farquharson*.² But the indorsee does not take it subject to claims arising out of collateral matters, as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties.

The doctrine laid down in *Burrough v. Moss* has been followed in *Stein v. Yglesias*, and, we believe, never disputed. Notice of the existence of the set-off to the holder of the bill at the time it was due makes no difference, as was settled in *Whitehead v. Walker*,³ unless, indeed, express notice was given by the party liable, and evidence of acquiescence in it, such as would amount to proof of an agreement to set off by both parties, which would be a satisfaction of the bill independently of the statute of set-off.

This being clearly settled, what is the effect of an indorsement of an overdue bill under the circumstances mentioned in the plea? These, though inaccurately stated, we think, amount to an averment that both the indorser and indorsee, knowing that there was a debt due to the defendant, which would be set off if the action should be brought by the indorser against the defendant, in order to defeat that set-off, and fraudulently, so far as that was a fraud, but no further, agreed that the bill should be indorsed, and it was therefore indorsed, without value to the plaintiff.

Though the plaintiff gave no value, the bill by the indorsement is transferred to him, and he has a right to sue on the bill if any intermediate party is a holder for value. There is, therefore, no defect in his title on that account. The only question then is, does the supposed fraud vitiate it; and in what way? Is it really a fraud, though called so? We think it is no fraud.

¹ 9 M. & W. 422.

² 1 Stark. 259.

³ 10 M. & W. 696.

The holder is under no legal obligation to allow the debt to be set off against the claim on the bill, unless he has entered into a contract to that effect with the defendant, which contract would create an equity in favor of the defendant attaching to an overdue bill. His power to circulate it is not restrained simply by the existence at the time of a debt of equal value, and his circulating it is, therefore, no infringement of any existing right of the defendant. It is wholly contingent whether the defendant will have a debt due to him from the plaintiff when the bill is sued upon, and, if there be, whether the defendant will choose to plead a set-off. Till then, the whole amount of the bill is due to the plaintiff; and if he indorses over the bill, though he must have known that the contingent right of set-off would be defeated, he clearly would give a good title. Does it become a fraud and defeat the title, if he actually intends to do, by indorsing it, what, under the circumstances, would be the necessary result of that act? and would it become so if he communicates that intention to the indorsee, and the latter agreed to assist him?

This, we think, is no fraud, and does not avoid the transaction. If it was a fraud, what would the consequence be? The transfer would be valid between the parties, and void only as against the party intended to be defrauded. That would not enable the defendant to set off against the plaintiff the debt due from another; for it would be against the words of the statute, which apply only to mutual debts between the defendant and plaintiff. *Vide Isberg v. Bowden*.¹ The cases in which a set-off has been allowed of debts not due from the plaintiff to the defendant are explained in the judgment in that case. They are cases where the real principal has permitted another to deal as owner, and cannot be permitted to interfere with allowing the same defence against the real principal which he would have had against the apparent one. See *Isberg v. Bowden*,¹ *Carr v. Hinchliff*,² *George v. Clagett*,³ as explained in *Tucker v. Tucker*.⁴ That is entirely different from the present case.

We think, for these reasons, that the sixth plea is bad.

Judgment for the plaintiff.⁵

¹ 8 Exch. 852.

² 4 B. & C. 547.

³ 7 T. R. 359.

⁴ 4 B. & Ad. 745.

⁵ *McDuffie v. Dame*, 11 N. H. 244; *Ordiorne v. Woodward*, 29 N. H. 541; *Perry v. Mays*, 2 Bail. 354, *contra*.—ED.

ASHURST v. THE OFFICIAL MANAGER OF THE ROYAL BANK OF AUSTRALIA.

IN THE KING'S BENCH, MAY 30, 1856.

[Reported in 27 *Law Times*, 168.]

DECLARATION on a promissory note payable to bearer two years after date.

Plea: that, after the making of the note, it was delivered to one Boyd, who became bankrupt, and the defendants were his assignees; and that, after the bankruptcy, and after the note had become due, Boyd transferred the note to the plaintiff.

Replication, that the plaintiff at the time of the transfer had no notice of any act of bankruptcy.

Demurrer thereto.

Bovill, in support of the demurrer. This note being overdue at the time of the transfer to the plaintiff, he takes it subject to all the equities affecting the title of the transferrer (*Tinson v. Francis*¹); and the title of the transferrer was destroyed by his bankruptcy.

H. Hill. The question is whether the ordinary doctrine is applicable to this case. The defendants are the assignees of Boyd, and are in a sense by this plea setting up their own laches. There is no equity therefore to defeat the plaintiff's title as against them. *Charles v. Marsden*, *Stein v. Yglesias*, *Parr v. Jewell*,² and other cases collected in *Smith's L. C.* 258.

LORD CAMPBELL, C. J. I think the defendant entitled to our judgment. The law is clearly laid down by Lord Ellenborough in 1 Camp., and to that I adhere. If the note had been transferred by an uncertificated bankrupt before it was due, the bearer for value would have had a right to sue upon it;* but the transfer being after it was due, he has no such right, because the transferee can take no better title than the transferrer had. The bankruptcy goes to the very title of the transferrer; and after it had become due, though called a negotiable instru-

¹ 1 Camp. 19.

² 16 C. B. 709.

* See *Lowndes v. Anderson*, 13 East, 130, in which case, however, the bill was not taken from the bankrupt in person. Under the English bankruptcy act and the United States bankrupt law, it seems clear that a bankrupt has no more power of investing a purchaser with the title to a bill or note negotiable by delivery than he would have in the case of an ordinary chattel. But a second transfer of the bill or note — unlike the transfer of an ordinary chattel — to a purchaser for value without notice would give the latter a title unimpeachable by the assignee of the bankrupt. — ED.

ment, it was in truth a chattel, and only transferable like any other chattel. The cases cited by Mr. Hill do not apply, because the objection is that the transferror had no title. His right had vested in his assignees: he was a mere stranger; and the plaintiff had no better title than if he had taken it from a person who had stolen it.

COLERIDGE, J., concurred.

ERLE, J. It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferror can only pass such title as he himself had. As to negotiable instruments, during their currency, delivery to a *bona fide* holder for value gives a title, even though the transferror should have acquired the instrument by theft; but after maturity the instrument becomes in effect a chattel only, and is negotiable only in the sense I have mentioned.

CROMPTON, J. I agree that the plaintiff is not entitled to recover upon this note; but I do not think it correct to say that after maturity it becomes like a mere chattel, for the negotiability continues in all its strictness. In these cases, two things are to be considered. Generally, a chose in action is not assignable; but, with regard to negotiable instruments, as bills and promissory notes, a different rule obtains, and they are negotiable by delivery. But the question of negotiability is different from the question of title. As to that, the party taking the instrument during the currency of it may acquire a better title than the transferror had; but, when it is overdue, it comes disgraced into the hands of the transferee, and that principle does not apply. Then Mr. Hill says that that is not a universal rule, because it has been held in many cases that original want of consideration is not such a defect in the title as would defeat the right of a transferee for value, even after the bill or note had become due; but that is founded upon this ground, that it is in those cases part of the original consideration that the accommodation drawer should be intrusted with the power of giving a better title than he had himself. That, however, is an exception to the general rule, and perhaps strengthens it.

*Judgment for the defendant.*¹

¹ See *supra*, 747, n. 1 (last paragraph but one of the note). — ED.

HOLMES v. KIDD.

IN THE EXCHEQUER CHAMBER, DECEMBER 1, 1858.

[Reported in 3 Hurlstone & Norman, 891.]

DECLARATION by indorsee against acceptors of a bill of exchange for £300, drawn by one Caleb Watson.

Plea. As to £272 2s. 7d., parcel of the amount of the bill in the declaration mentioned, that before the indorsement or acceptance of the bill the defendants applied to the said Caleb Watson to advance them the sum of £300, which C. Watson agreed to do upon the terms of the defendants accepting the bill, and depositing with him a policy of insurance on the life of the defendant W. Kidd, and certain canvas of the defendants, of the value, to wit, of £400, as a security for the due payment by the defendants of the said bill; the said drawer of the said bill to have power of selling the said canvas, and applying the proceeds of such sale in payment of the amount due on the said bill, if the same was not paid by the defendants when due; that the said bill was accepted, and the said policy and canvas deposited upon the terms aforesaid, and that after the said bill was due the said drawer sold the canvas and realized by such sale £272 2s. 7d., and still retains and holds the same sum; that the bill was indorsed by the said drawer to the plaintiff, after the same was overdue and subject to the equity of the proceeds of the sale of the said canvas being applied to the payment and satisfaction of the said bill, and without any value or consideration having ever been given by the plaintiff for the said indorsement. Demurrer and joinder.

Judgment having been given for the defendants on the demurrer to this plea in the court below, the plaintiff assigned error.

Atherton argued for the plaintiff.¹ The effect of the agreement was to give to the drawer an option to sell the canvas and pay himself at any time while he continued the holder of the bill. At the moment of the indorsement, a perfect title vested in the indorsee. That could not be affected by any thing which the drawer might do after the bill left his hands. After the indorsement, the drawer could not take the proceeds of the canvas in payment of the bill. The statement in the plea that the bill was indorsed without value is not material. The only consequence of that is that the indorsee took it subject to the equities attaching to the bill. [WILLES, J. The bill was subject to the equity that upon the sale of the canvas the consideration was at

¹ Before Erle, J., Williams, J., Crompton, J., Crowder, J., and Willes, J.

an end.] The equity referred to is one only between the drawer and the acceptor of the bill: it is a collateral contract that the drawer, having indorsed the bill, should give up the canvas to the acceptor. There was originally abundant consideration for this bill. The plaintiff, therefore, by the indorsement, acquired a perfectly valid title, and is in the position of an innocent indorsee for value who cannot be affected by any thing done by the person from whom he takes, subsequently to the indorsement to him.

Brett, who appeared to support the plea, was not called upon.

ERLE, J. We are all of opinion that the plea is good, and therefore the judgment must be affirmed. On the drawing of the bill, there was an agreement that the canvas should be a security in the hands of the drawer, and, if sold, the proceeds should be applied in payment of the bill, if not paid by the defendant when due. The drawer held the bill till it was overdue, when he indorsed it without value to the plaintiff, and afterwards sold the canvas, and held the proceeds to be applied to the payment of the bill. The question is whether the receipt of the money by the drawer is a bar to this action. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer, the right to sue was defeasible: when he sold the canvas, it was defeated, and the plaintiff took the bill subject to that contingency.

WILLIAMS, J. I am of the same opinion. I agree that, when it is said that an indorsee takes subject to equities, the equities must arise out of the original transaction. Here the incumbrance on the bill was part of the transaction out of which the bill arose.

CROMPTON, J. Upon the concoction of this bill, it was agreed that it was not to be paid, if the canvas was sold. That agreement directly affects the bill, and was part of the consideration for it. The cause therefore differs from that of a right of set-off against the indorser, which is merely a personal right not affecting the bill. In the present case, the equity directly attaches to the bill. The plaintiff, therefore, got a defeasible title only.

CROWDER, J. The plea is an answer to the action. The case is within the ordinary rule applying to parties taking a bill by indorsement subject to equities which affect it.

WILLES, J., concurred.

*Judgment affirmed.*¹

¹ *Britten v. Fisher*, 26 Up. Can. Q. B. 338; *Canadian Co. v. Ross*, 22 Up. Can. C. P. 497 (*semble*); *Robinson v. Lyman*, 10 Conn. 30; *Farris v. Catlett*, 32 Mo. 469; *Walbridge v. Ribbee*, 20 Vt. 543; *Pecker v. Sawyer*, 24 Vt. 459, *accord*. — ED.

DEUTERS v. TOWNSEND.

IN THE QUEEN'S BENCH, JUNE 7, 1864.

[Reported in 5 Best & Smith, 618.]

THIS was an action on an overdue bill of exchange for £25 ; drawn by E. L. Levy on the 1st May, 1863, payable to himself, or order, three months after date, accepted by the defendant ; and indorsed by Levy to the plaintiff.

Plea. That before the commencement of this suit one B. W. Aaron, being the holder of the bill of exchange, commenced an action against the defendant by issuing out of the Court of Queen's Bench, on the 6th August, 1863, a writ of summons under "the Summary Procedure on Bills of Exchange Act, 1855," for the recovery of the amount of the bill and expenses of noting, and which writ of summons was in the special form contained in schedule to that Act annexed, and indorsed as therein mentioned ; and, by which indorsement, B. W. A. claimed £25 1s. and interest due to him as the holder of the bill ; and by which it appeared, and as the fact was, that E. L. L. had indorsed the same ; and which writ was served upon the defendant, and which action and writ were still pending, and had never been determined or discontinued ; and that the plaintiff afterwards, on the 24th of October, 1863, commenced his action under and by virtue of the provisions of "the Summary Procedure on Bills of Exchange Act, 1855," by issuing a writ of summons in the special form in Schedule A. to that Act annexed, and indorsed as therein mentioned, and by which indorsement the plaintiff claimed £25 5s. principal and interest due to him as the holder of a bill of exchange drawn by E. L. L. upon and accepted by the defendant, and indorsed by E. L. L., and also 2s. 6d. for noting, and £2 8s. for costs ; and which last-mentioned writ of summons so indorsed was issued by E. L. L. as the attorney for the plaintiff, and was duly served upon the defendant, and that the last-mentioned writ was issued and prosecuted by the plaintiff for the recovery of the same identical principal sum of money for which B. W. A. issued his writ, and during the pendency thereof, and upon and in respect of the same identical bill of exchange, and upon and in respect of the same identical consideration and no other ; and that the plaintiff took the bill and became the holder thereof, and E. L. L. indorsed the same to the plaintiff after the same became due, without any consideration or value, and with notice and knowledge of the

pendency of the first-mentioned action, and all the several matters in this plea mentioned.

Demurrer, and joinder.

Harington, in support of the demurrer. The plaintiff, being a mere indorsee without value and without notice, stands in the position of Levy who indorsed to him, and the plea shows nothing to impeach Levy's title. [He cited *Bosanquet v. Dudman*¹ and *Watkins v. Maule*.] [BLACKBURN, J. In *Byles on Bills*, 159, 160, 8th ed., it is said: "The holder cannot transfer after action brought, so as to give his transferee a right of action, provided the latter were aware that the action was commenced," for which is cited *Marsh v. Newell*.²] The authorities there cited do not bear out that position. [He was then stopped.]

R. A. Fisher, contra. Every indorsement of a bill of exchange is *prima facie* for value. *Dabbs v. Humphrey*,³ *Dod v. Edwards*. In the passage cited from *Byles on Bills*, the author also refers to *Jones v. Lane*,⁴ where Alderson, B., says: "In *Colombies v. Slim*, cited in Mr. Chitty's Book on Bills, the Court of King's Bench held that an indorsement after action brought on a note overdue would nevertheless give the indorsee a right of action, unless he had express notice of the action. Here the defendant had express notice of it, and I think an action would not lie, at the defendant's suit on the bill. I should probably, however, had it been necessary, have allowed the defendant to have argued this question before the full court." In Chitty on Bills, p. 157, 10th ed., we find, "Nor can a person who receives a bill with notice that an action has been commenced thereon, and is still depending, maintain another action against the same party;" and he adds, in a note, "But it is otherwise where the indorser has not received such notice." *Colombies v. Slim*.⁵ The pendency of an action by an informer to recover a penalty is a bar to a similar action by another informer. [CROMPTON, J. That is on a different principle. The statutes give the penalty to the party who first sues for it.] When an overdue bill is indorsed, it passes to the indorsee with all the equities between the original parties to that particular bill. Story on Bills, § 220, 4th ed.

Harington was not called on to reply.

COCKBURN, C. J. Our judgment is for the plaintiff. It is difficult to see what are the facts intended to be stated in this plea. But I will assume they come to this, — that Levy the drawer of the bill having indorsed it to Aaron, and Aaron having brought an action on it (which we must take to have been after the bill had become due and been dishonored), Aaron transferred it by indorsement to the plaintiff. The

¹ 1 Stark. 1, 2.

² 1 Taunt. 109.

³ 4 M. & Sc. 285.

⁴ 3 Y. & C. 281, 294.

⁵ 2 Chit. 637.

point intended to be raised is, therefore, that the holder of a bill who has brought an action on it cannot transfer it to another indorsee for value so as to enable him to sue, if the indorsee had notice of the pendency of the former action. That is a proposition to which I am not prepared to assent. The holder of a bill is *prima facie* entitled to bring an action upon it, even though it was indorsed to him after it became due; for the only consequence of that is, that whatever would have been a defence to an action on the bill in the hands of the transferrer is equally so to one in the hands of the transferee. Here the transferrer could not have brought two actions, and the two actions are not brought by him, for one is by the holder, who is entitled to bring it if the bill is not paid. The acceptor is liable on the bill, and might prevent a second action by paying its amount. Suppose he does not, and an action is brought by the second indorsee, what is his remedy? The answer is that two courses are open to him. He may pay the bill and plead a plea *pais darrein* continuance, although there might be inconvenience on the score of costs. But he has another very simple remedy. He may come to this court for its intervention, because in justice and equity, when the bill has been transferred to the second holder, the new action is equivalent to an abuse of its process, which the court will not allow. That is a much simpler and better course than talking about equities. Try the present question by this test. It is perhaps consistent with this plea that Aaron, having brought an action against the acceptor, had also had recourse to Levy, the drawer; for often the holder of a bill brings actions against every person whose name is upon it. Suppose he had done so here, could not Levy have brought his action on this bill when he got it back? Therefore, if Levy could have brought his action, I see no reason why the transferee after the first holder could not bring his action also. It is true that in *Jones v. Lane*,¹ Alderson, B., lays down a different rule; but he says it was not material to decide the point, and, if it were, he would wish a further argument upon it. Neither does the case of *Marsh v. Newell*,² referred to in *Byles on Bills*, p. 159, 8th ed., bear out the proposition.

CROMPTON, J. This plea is bad, and does not raise the question which it probably intended to raise. The facts are quite consistent with this, that Levy may have been compelled to pay this bill, and so became holder, and consequently entitled to sue, although the later averments in the plea show that the plaintiff took the bill from Levy without consideration, and after it became due, and is therefore in no better position than he. I therefore think that the great question meant to be raised here does not arise. Here is an action by the

¹ 3 Y. & C. 281, 294.

² 1 Taunt. 109.

holder of a bill, who afterwards transfers it: then the question is, can the transferee sue if he has notice of the pending action. It is not necessary to decide that point; but I am inclined to agree with the rest of the court that the pendency of that action is matter for the equitable consideration of the court, and not a matter pleadable in bar.

It appears clear from the authorities that the fact of a chose in action being in litigation does not make it not transferable. The defendant has two modes of relief. He might either plead *auter action pending*, or apply to the equitable jurisdiction of the court to stay the proceedings. But, by the bill having been passed in this way to another party to sue upon it, the plea of *auter action pending* would fail, because the new action applies to the new indorsement, and therefore one might think he might say, I will allow you to recover, and plead, as a plea *puis darrein* continuance, judgment recovered by another party. But by the new rules an inconvenience arises there, because to such a plea the plaintiff may say, I had a good cause of action at first.

On the whole, though there are some authorities in the books to the contrary, I think a plea such as I have suggested would not be pleadable in bar; and that, at all events, the plea in its present form is bad.

BLACKBURN, J. I agree with the Lord Chief Justice and my brother Crompton that this plea as pleaded is clearly bad, and that, if it had been pleaded in the form they suggest, it would have been equally so. In taking the bill from Levy, the plaintiff has no better title than he, and the question therefore is whether the facts in the plea would have prevented Levy maintaining the action. Those facts are: that Levy having drawn the bill, which must be taken to have been for value, Levy indorsed to Aaron, which we must also assume to have been for value; that Aaron accepted the bill, and after that Levy became holder (it does not appear how), but we must take it to have been in the only possible way, by Aaron coming on him and his taking back the bill from Aaron. Now the indorsee having sued the acceptor, can he be defeated by a plea alleging that a previous action had been commenced by Aaron? It is enough to state the proposition. How can the drawee be responsible for what the indorsee may have done? Besides which (although it is hardly worth citing an authority for), the point has been decided in *Callow v. Lawrence*. But suppose the plea had stated what I imagine was intended, that Aaron, after he commenced the action, indorsed the bill for an oppressive purpose to another, still the plea would not be good. The holder of a bill may indorse it, and, if overdue, the indorsee takes it, with the equi-

ties upon it. But I never heard that an indorsee takes a worse title than the indorser. If Aaron had brought a second action, no more could be pleaded against him than can be pleaded against the original indorsee.

Then Byles on Bills, p. 159, 8th ed., and Chitty on Bills, p. 157, 10th ed., are cited, to show that, if an indorsee takes a bill with notice that an action is pending, it is a defence for the acceptor. If this means that that fact can be pleaded in bar against the maintenance of the second action, it is contrary to principle, and the authorities cited for it do not bear it out. In *Marsh v. Newell*,¹ the question was whether the court could, under those circumstances, stay the action, which was entirely a matter for their equitable jurisdiction. In *Colombies v. Slim*,² the court decided that a plea of this sort was bad for want of an averment of notice of the bill being overdue. But they proceed to say that if there had been notice of indorsement, and the second action were brought to oppress the defendant, it would be otherwise. That very expression shows that that is not the substance of a plea in bar, for you could not introduce an averment that the action was brought with the view to oppress. But it is very good ground for an application to stay the proceedings on the first action.³ The only other authority is *Jones v. Lane*.⁴ All that amounts to is that Alderson, B., threw out *obiter* there might be a difference in consequence of the indorsee having notice of the former action; but he expressly says that it was not necessary to decide upon it, and that he should like to hear further argument.

SHEE, J., concurring,

*Judgment for the plaintiff.*⁵

¹ 1 Taunt. 109.

² 2 Chit. 637.

³ *Lee v. Jilson*, 9 Conn. 94; *Curtis v. Bemis*, 26 Conn. 1; *Vila v. Weston*, 83 Conn. 42; *Hall v. Gentry*, 1 A. K. Marsh. 555, *accord*.

Conf. Ferry v. Page, 8 Iowa, 455; *Fannon v. Robinson*, 10 Iowa, 272; *Enston v. Friday*, 2 Rich. 427. — ED.

⁴ 3 Y. & C. 281.

⁵ See *Marsh v. Newell*, 1 Taunt. 109; *Colombies v. Slim*, 2 Chit. 637; *Jones v. Lane*, 8 Y. & C. 281; *McLennan v. McMinnes*, 23 Up. Can. Q. B. 114. — ED.

The case, *In re European Bank*, which properly belongs in this section, will be found in the Appendix to this volume, p. 891. — ED.

LOSEE v. DUNKIN.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1810.

[Reported in 7 Johnson, 70.]

IN error, from the Court of Common Pleas of Dutchess County.

The suit below was an action of assumpsit on a promissory note given by the defendant to David Newton, payable on demand to Newton, or bearer, for the sum of \$55, with interest, and dated the 16th day of January, 1805. An assignment in writing from Newton to the plaintiff, dated April 3, 1805, was indorsed on the note. The declaration was in the usual form on the note.

Plea, *non assumpsit*.

The defendant proved that, shortly after the date of the assignment, he paid Newton \$50, which he agreed to credit on the note.

The plaintiff's counsel contended that this evidence was inadmissible on the issue of *non assumpsit*; but the court ruled that it should be admitted, and the jury found a verdict for the plaintiff for \$6.75; and judgment was given for the plaintiff for that sum, and for the defendant for the costs.

The case was submitted to the court without argument.

PER CURIAM. The note was payable on demand, and negotiated upwards of two months and a half after it was given. The first question that naturally arises is whether this is to be considered as a note negotiated after it was due, so as to let in the defence. There is no precise time at which such a note is to be deemed dishonored. In *Furman v. Haskin*,¹ a note payable on demand, and negotiated eighteen months after it was given, was considered as a note out of time, so as to subject the indorsee to the matter of defence existing when it was indorsed. On the other hand, in *Hendricks v. Judah*,² the note was payable on demand, and drawn in England, and was put in suit in this State by the indorsee within a year from its date; and the court said that the maker was not entitled, in that case, to a set-off of demands against the payee, without proof of a fraudulent assignment; for it was to be presumed that the note was assigned soon after its date. The demand must be made in reasonable time; and that will depend upon the circumstances of the case and the situation of the parties. There are no particulars peculiar to this case disclosed; and the court cannot say that it was erroneous to let in the defence,

¹ 2 Caines, 369.

² 1 Johns. Rep. 819.

for the circumstances of this case might have been such as to justify the conclusion that the note was dishonored when it was assigned.

Assuming this to have been the case, there is no doubt but that the defendant might give in evidence, under the general issue, payment to the original payee before the indorsement. *Brown v. Davis*, *Brown v. Cornish*.¹ If the payment was in full discharge of the note, it would go in bar of the suit; and, if it was not a payment in full, it will go only in mitigation of damages.

The judgment below must therefore be affirmed.

*Judgment affirmed.*²

¹ 1 Ld. Raym. 217.

² The doctrine that a demand note is regarded as an overdue note in the hands of the transferee, unless the transfer was made within a reasonable time, obtains generally in this country. In the following cases, the transfer was held to be within a reasonable time: *Tomlinson Co. v. Kinsella*, 31 Conn. 268 (2 years); *Stewart v. Smith*, 28 Ill. 397 (5 days); *Dennen v. Haskell*, 45 Me. 430 (1 month); *Thurston v. McKown*, 6 Mass. 428 (7 days); *Ranger v. Cary*, 1 Met. 369 (1 month); (but see *Sacket v. Loomis*, 4 Gray, 148, and *Mass. Gen. St. c. 53, § 10*); *Carll v. Brown*, 2 Mich. 401 (1 month); *Hendricks v. Judah*, 1 Johns. 319; *Sanford v. Mickles*, 4 Johns. 224 (5 months); *Wethey v. Andrews*, 3 Hill, 582 (1 week); *Weeks v. Pryor*, 27 Barb. 79 (3 days); *Dennett v. Wyman*, 13 Vt. 485 (2 days). *Conf. Wright v. Leibert*, 4 Phil. (Pa.) 54.

In the following cases, the transfer was held not to be within a reasonable time; *Nevins v. Townsend*, 6 Conn. 5 (8 months); *Tucker v. Smith*, 4 Greenl. 415 (5 years); *Parker v. Tuttle*, 44 Me. 459 (4 months); *Ayer v. Hutchins*, 4 Mass. 370 (8 months); *Hemmenway v. Stone*, 7 Mass. 58 (1 year); *Clark v. Leach*, 10 Mass. 51 (6 months); *Stockbridge v. Damon*, 5 Pick. 223 (6 years); *Thompson v. Hale*, 6 Pick. 259 (6 months); *Sylvester v. Crapo*, 15 Pick. 92 (11 months); *Stevens v. Bruce*, 21 Pick. 193 (2½ months); *American Bank v. Jenness*, 2 Met. 288 (8 months); *Knowles v. Parker*, 7 Met. 30 (2 years); *Palmer v. Palmer*, 4 Am. L. T. Rep. n. s. 366; *Linn v. Rugg*, 19 Minn. 181 (4 years); *Emerson v. Crocker*, 5 N. H. 159 (10 months); *Odiorne v. Howard*, 10 N. H. 343 (4 years); *Carlton v. Bailey*, 27 N. H. 230 (7 months); *Cross v. Brown*, 51 N. H. 486 (13 months); *Furman v. Haskin*, 2 Cai. 369 (18 months); *Loomis v. Pulver*, 9 Johns. 244 (2 years); *Herrick v. Woolverton*, 41 N. Y. 581 (3 months); *Little v. Dunlap*, *Busbee*, 40 (2 years); *Cromwell v. Arrott*, 1 S. & R. 180 (18 months); *Atlantic Co. v. Tredick*, 5 R. I. 171 (1 year); *Camp v. Scott*, 14 Vt. 387 (2 months); *Morey v. Wakefield*, 41 Vt. 24 (10 months). See *Barbour v. Fulerton*, 36 Pa. 105 (1 month).

A note containing no time of payment, being regarded as immediately due, cannot be transferred so as to give the transferee a greater interest than the payee himself has. *Sackett v. Spencer*, 29 Barb. 180. But see *Pindar v. Barlow*, 31 Vt. 529.

The rule illustrated by the preceding cases in this note has, of course, no application to notes payable on demand to bearer, *e. g.* bank-notes, such notes being obviously intended to circulate indefinitely. *Solomons v. Bank of England*, 13 East, 135 n.; *Bullard v. Bell*, 1 Mas. 252; *Ballard v. Greenbush*, 24 Me. 336, 338; 9 Op. Atty.-Gen. 413. — Ed.

LEAVITT, PRESIDENT OF THE AMERICAN EXCHANGE BANK, v.
PUTNAM AND OTHERS.

IN THE COURT OF APPEALS, NEW YORK, JULY, 1850.

[Reported in 3 Comstock, 494.]

APPEAL from the Superior Court of the city of New York, where the action was against Putnam and others, as the indorsers of a promissory note. The plaintiff was nonsuited on the trial, and after judgment he appealed to this court. (See 1 Sandf. Superior Court Rep. 199.)

J. W. Gerard, for appellant. I. The legal effect of a blank indorsement of a note past due is the same as that of one before maturity, with but one difference, that, as in the former case the note cannot be presented at its maturity, the contract then is to pay on demand of the maker, his failure to pay, and notice to the indorser, within a reasonable time after the transfer, instead of requiring the performance of those conditions at the maturity of the note. *Berry v. Robinson*, *Mitford v. Walcot*;¹ Story on Prom. Notes, § 180, and cases cited.

II. An indorsement not negotiable in its terms, of a negotiable promissory note, is negotiable by the blank indorsement of the payee named in the first indorsement. *Callow v. Lawrence*; *Chitty on Bills*, 8th Am. ed. 257, 260; *Moore v. Manning*, *Edie v. East India Co.*, *Havens v. Huntington*,² *Rice v. Stearns*, *Guild v. Eager*,³ *Russell v. Ball*,⁴ *Wilson v. Codman's Ex'rs*.⁵ And this is equally the case whether the indorsement be made before or after the maturity of the note. The analogy noticed in some of the decisions, between the indorsement of a note past due and the drawing of a new draft payable on demand, is intended only to illustrate the rule as to the time of demand and notice in such cases, stated in the first subdivision of this point, and is for the benefit of the holder, and not to his injury. It is said to be equivalent only to the drawing of a new bill, for the purpose of presentment and notice. In regard to the pleading and legal effect, the instrument is to be regarded as a simple indorsement. *Seabury v. Hungerford*,⁶ *Upham v. Prince*,⁷ *Dean v. Hewitt*; ⁸ *Chitty on*

¹ 1 Ld. Raym. 574.

⁴ 2 Johns. 50.

⁷ 12 Mass. 14.

² 1 Cowen, 387.

⁵ 3 Cranch, 193.

⁸ 5 Wend. 257.

³ 17 Mass. 615.

⁶ 2 Hill, 80.

Bills, 8th Am. ed., 588; *Parsons v. Parsons*,¹ *Young v. Wright*,² *Boehm v. Stirling*; ³ *Chitty on Bills*, 8th Am. ed., 266, and cases cited in note (2); *Williams v. Field*,⁴ *Heylyn v. Adamson*.

S. Sherwood, for respondents. Paper may be indorsed after due, but it then assumes a new character and is governed by new rules. It then becomes as between indorser and indorsee a new draft on the maker for the money in his hands, and is in all respects a new contract, and it may be made negotiable or otherwise as the parties choose: it being a new draft, its negotiable quality and time of payment are not affected by the old note. The indorsement, in the present case, over the names of the defendants, if any thing, is a new draft, payable to A. Thacher alone, and not negotiable. It gave a right of action to Thacher against the maker, because it transferred it to him. But, as a new draft, no terms of negotiability are contained in it, and it therefore possesses none. *Havens v. Huntington*,⁵ *Guild v. Eager*,⁶ *Callow v. Lawrence*. It is a new contract limited to Thacher only, and gives the plaintiffs no right of action. *Brown v. Davis*, *Berry v. Robinson*, *Prosser v. Luquer*,⁷ *Ketchell v. Burns*.⁸

HURLBUT, J. On the 29th day of August, 1844, Messrs. J. W. & R. Leavitt made their note for \$1,570.52, payable to the order of T. Putnam & Co. (the defendants) eight months after date. A few days after the maturity of the note, the defendants indorsed it as follows: "Pay the within to A. Thacher, value received, May 21, 1845. T. Putnam & Co." Thacher indorsed without recourse, and delivered the note for a valuable consideration to the American Exchange Bank, in whose behalf this action is brought.

On the trial, the defendants urged, among other grounds of objection to the plaintiff's recovery, that the defendants' indorsement was in effect a new draft payable to Thacher only, and not negotiable, so that no action could be maintained upon it in the name of the plaintiff. In this they were sustained by the court, and the plaintiff was nonsuited.

The other objections taken by the defendants on their motion for a nonsuit were not considered by the court below, and under the circumstances of the case cannot be noticed on this appeal; so that the only thing for us to consider is whether the indorsement of a note made after due differs from one made before maturity in respect to its negotiability. It was conceded on the argument that no express authority could be found sustaining the distinction upon which the

¹ 5 Cowen, 476.

² 1 Campb. 139.

³ 7 Term Rep. 419.

⁴ 3 Salk. 68.

⁵ 1 Cowen, 387.

⁶ 17 Mass. 615.

⁷ 4 Hill, 420-423.

⁸ 24 Wend. 456.

decision of the Superior Court was based, but it was urged that the defence could be sustained upon the principle that a dishonored note loses its mercantile character, and its indorsement becomes an original contract which must be made expressly negotiable in terms, or it could not be held to possess the character of negotiability. There is unquestionably a difference between the indorsement of a note after due and one while it is running to maturity, but this relates only to a single point arising from the necessity of the case, to wit, the time of payment, which, in the latter indorsement, is fixed at a future day by the express agreement of the parties, while in the former it is declared by law to be within a reasonable time, upon demand. But in all other respects the contract is the same as an indorsement in the usual course of trade; and it is difficult to perceive how the single difference referred to can at all affect the negotiability of the indorsement. A bill or note does not lose its negotiable character by being dishonored. If originally negotiable, it may still pass from hand to hand *ad infinitum* until paid by the drawer. Moreover, the indorser after maturity writes in the same form, and is bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. Thus, the paper preserves its mercantile existence, and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument, or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law-merchant and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was perhaps reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course of decisions, have been treated as within the law-merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill, and is equally negotiable. *Edie v. The East India Co.*, *Milford v. Walcott*,¹ *Allwood v. Hazelton*,² *Bishop v. Dexter*,³ *Berry v. Robinson*.

The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defend-

¹ 1 Ld. Raym. 574.

² 2 Bail. 457.

³ 2 Conn. 419.

ants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words "or order," the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefore was effectual to transfer the note to the plaintiff. Chitty on Bills, 136; Story on Prom. Notes, § 139.

I am of opinion that the judgment of the Superior Court should be reversed, and a new trial awarded.

Judgment reversed

ANN PINE v. ALLEN N. SMITH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1858.

[Reported in 11 Gray, 82.]

ACTION of contract on a promissory note, made by the defendant, and indorsed to the plaintiff on the last day of grace. Answer, that the note was subject to the law of the State of New York, and was usurious and void.¹

G. J. Tucker, for the plaintiff. The defendant was not inadmissible as a witness to impeach the note which he had signed. Rev. Sts. c. 35, § 4; *Little v. Rogers*,² *Butler v. Kimball*,³ *Bubier v. Pulisifer*.⁴

M. Wilcox, for the defendant. The note was indorsed to the plaintiff on the last day of grace, and therefore subject to all legal infirmities. *Conley v. Grant*.⁵ The defendant was therefore a competent witness to prove the facts relied on. Rev. Sts. c. 35, § 4; St. 1846, c. 199; *Thayer v. Crossman*,⁶ *Cutler v. Bubier*.⁷

MERRICK, J. The note set out in the declaration was indorsed and transferred to the plaintiff on the last day of grace. It was then due; and payment might have been demanded of the maker at any reasonable hour during the day. *Staples v. Franklin Bank*,⁸ *Whitwell v.*

¹ A portion of the case relating to the question of usury and conflict of laws has been omitted. — Ed.

² 1 Met. 108.

³ 5 Met. 94.

⁴ 4 Gray, 592.

⁵ 20 L. Rep. 595: misreported. The decision was that a negotiable promissory note not payable at any particular place was not dishonored in the hands of a bona fide holder for value, who took it before the close of business hours on the last day of grace. *Crosby v. Grant*, 36 N. H. 278.

⁶ 1 Met. 416.

⁷ 4 Gray, 588.

⁸ 1 Met. 43.

Brigham.¹ She took it therefore after it had in fact become due, and held it subject to any defence which might have been made available against it while in the hands of the payee. *Ayer v. Hutchins*,² *Sargent v. Southgate*,³ *Portland Bank v. Maine Bank*.⁴ For this reason, the objection taken to the competency of the defendant as a witness to facts having a tendency to prove any illegality in the inception of the note, because he was the maker of it, cannot be sustained. The rule that a maker or indorser shall not be permitted by his testimony to invalidate a security which he has put in circulation, and given credit to by his signature, has never been extended to notes negotiated after they have become due and payable. On the contrary, it has been expressly determined that in such case the indorser is a competent witness, and his testimony admissible in relation to any matters which may be given in evidence in defence. *Thayer v. Crossman*,⁵ *Newell v. Holton*.⁶

GEORGE A. VINTON *v.* JOHN KING.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER
TERM, 1862.

[*Reported in 4 Allen, 562.*]

WRIT of entry to foreclose a mortgage. The defence was that the note and mortgage were obtained by duress and fraud, and were given for an illegal consideration. For the purpose of obtaining a decision upon the questions of law arising in the case, Allen, C. J., directed a verdict for the plaintiff, in the Superior Court, upon evidence which is sufficiently stated in the opinion; and the defendant alleged exceptions.

E. Mellen, for the defendant.

G. F. Hoar, for the plaintiff. The deed was, at most, voidable only, and not void. *Perkins*, 15, 16; *Somes v. Brewer*,⁷ Bul. N. P. 172. The defendant cannot be permitted to avoid it against a purchaser for value, before maturity, without notice, after having suffered the transaction to remain unquestioned for months, taking no pains to set purchasers on their guard, or to set aside the conveyance. *Somes v. Brewer*,

¹ 19 Pick. 117.

² 4 Mass. 370.

³ 5 Pick. 312.

⁴ 11 Mass. 204.

⁵ 1 Met. 416.

⁶ 10 Gray, 350.

Brown v. Bain, Court of Session, June 3, 1864 (*semble*); *Walter v. Kirk*, 14 Ill. 55; *Savings Bank v. Bates*, 8 Conn. 505 (*semble*); *Goodpaster v. Voris*, 8 Iowa, 334 (*semble*); *Crosby v. Grant*, 36 N. H. 273, *contra*. — ED.

⁷ 2 Pick. 184.

ubi supra; *Fletcher v. Peck*.¹ The true reason why defences between original parties are open when an overdue note is indorsed is that, in such case, it is not the contract which is transferred, but a right to damages for the breach of the contract. There is, in such case, no contract between the original promisor and the assignee. The contract has already been broken; and a right to damages is all that remains. If indorsed before failure to fulfil, there is a direct promise to the assignee; and he is not in privity with his assignor, and does not claim under him. *Fisher v. Leland*,² *Oridge v. Sherborne*,³ *Clark v. Pease*.⁴ The indorsement of a note payable by instalments, therefore, constitutes a direct promise from the maker to the indorsee, to the extent of such instalments as are not yet due, and gives to the latter a right to damages for the non-payment of such as are overdue. But, even if non-payment of an instalment is treated as notice, it is only notice *pro tanto*.

METCALF, J. The mortgage, under which the plaintiff claims possession of the premises demanded in his writ, was given to secure payment of a note, dated April 26, 1858, of the following tenor:—

“Two years after date, by instalments of \$53 in every six months after this date, until fully paid, I promise to pay Peter Bruyett, or bearer, the sum of two hundred and twelve dollars and interest in manner above stated.
JOHN KING.”

This note, though payable by instalments, was negotiable (*Oridge v. Sherbone*³), and was transferred, and the mortgage assigned to the plaintiff, about three months after the first instalment was overdue and unpaid. This action was commenced on the 30th of May, 1859, after the second instalment was made payable. And, if the plaintiff is entitled to any judgment, it is only to a conditional judgment for possession; to wit, unless the defendant pay to him, within the time specified by statute, such sum as shall be found due on the mortgage. Rev. Sts. c. 107, § 5, and Gen. Sts. c. 140, § 5. If the court find that nothing is due on the mortgage, the plaintiff cannot have judgment.

In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure payment of a note, the defendant may show the same matters in defence (the Statute of Limitations excepted, 19 Pick. 535) which he might show in defence of an action on a note. If, therefore, this action were by the mortgagee, Bruyett, instead of his assignee, the plaintiff, the defendant might successfully defend by showing that the note and mortgage were obtained from him by duress, and the plaintiff does not deny that the same defence may be made against him, if, when the note was transferred to him, it was dis-

¹ 6 Cranch, 87, 133.

² 4 Cush. 456.

³ 11 M. & W. 374.

⁴ 41 N. H. 414.

honored by non-payment of the first instalment; it being admitted law that he who takes a note after it is due takes it subject to all objections and equities to which it was liable in the hands of him from whom he takes it, and to the same defences in a suit against the maker which the maker might set up in an action against him by the payee; that the circumstance that a note is overdue makes it incumbent on the party receiving it to satisfy himself that it is a good one, and that if he omit so to do he must stand in the situation of him who was holder at the time it was due. Bayley on Bills (2d Amer. ed.), 133, 544; Chit. Bills (12th Amer. ed.), 247, 248 (10th Amer. ed.), 216-218; 3 Kent Com. (6th ed.), 90; *Gold v. Eddy*,¹ *American Bank v. Jenness*,² *Andrews v. Pond*,³ *Tucker v. Smith*.⁴ But the ground assumed by the plaintiff is that in this case the note had not, within the rule of law on this subject, come to maturity, and was not overdue and dishonored before it was transferred to him, because the time for payment of the last three instalments had not then come. This ground is not maintainable. As to the first instalment of \$53 in six months, and interest on \$212, the note had come to maturity, and was overdue and dishonored when the plaintiff took it; and, as to the amount of that instalment, it is not to be doubted that the defendant may make the same defence against the plaintiff which he might have made against the payee. And we are of opinion that he may make the same defence to the whole note. The note is a single contract to pay \$212 in four half-yearly instalments; and the plaintiff took it with notice on its face that, as to the first instalment, the defendant might have a justifiable cause for withholding payment, whatever that cause might be; whether a cause which affected that instalment only, — as a release thereof by the payee, or a legal set-off against him to the amount thereof, — or a cause which, between him and the payee, vitiated the whole note, as want or failure of consideration, unlawful consideration, fraud, or duress. And if the payee had sued for the recovery of the first instalment, before the second was made payable, the defendant might have defeated the action, by showing that the note was wholly void; and a judgment for him, on such ground of defence, would have been conclusive against the maintenance by the payee of a subsequent action to recover the other instalments. *Black River Savings Bank v. Edwards*.⁵

The case of *Clark v. Pease*,⁶ to which we were referred by the plaintiff, would have been an authority in his favor, if he had received the note before it was dishonored, and had shown that he took it *bona fide*,

¹ 1 Mass. 1.

² 2 Met. 289.

³ 13 Pet. 79.

⁴ 4 Grænl. 415.

⁵ 10 Gray, 387.

⁶ 41 N. H. 414.

and paid a valuable consideration for it. The authorities are numerous that, against such an indorsee or bearer, the fact that the note was originally obtained by duress is not a legal defence.

*Exceptions sustained.*¹

AZEL AMES AND ANOTHER v. PHILIP R. MERIAM
AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1867.

[Reported in 98 Massachusetts Reports, 294.]

CONTRACT on the defendants' check, dated January 2, 1865, on a bank in Boston, for seven hundred dollars, payable "to J. L. Babson, or bearer," and indorsed "John L. Babson, Wm. P. Dolliver."

At the trial in the Superior Court before Russell, J., without a jury, these facts appeared. The defendants made and signed the check and delivered it to Babson on its date, "with direction to deposit or pass it before January 4, and return the money to the defendants;" and there was evidence tending to show that they received no consideration for it. Babson did not deposit it in any bank, but on or about January 8 "passed it to Dolliver, receiving on it only about two hundred dollars." Dolliver was a director in a bank at Rockport, and Babson delivered it to him "for the purpose of having it deposited in the bank," and to "obtain the money on it and deliver the amount to said Babson." Dolliver did not deposit the check, but on or about January 12 passed it to the plaintiffs in part payment of a debt due from him to them; and they, on receiving it, presented it at the bank on which it was drawn, but the bank refused to pay it. On the same day, but whether before or after this refusal did not by the bill of exceptions distinctly appear, one of the plaintiffs made some inquiry of one of the defendants about the check, who replied that it was good and would be paid, but not until he should see Babson; and "the defendants notified the bank on which said check was drawn not to pay the same, and it never was paid." There was also evidence "tending to show that one of the defendants had promised to pay

¹ Field v. Tibbetts, 57 Me. 358; Fitchburg Co. v. Davis, 121 Mass. 121, *accord.* — Ed.

It has been held that a default in the payment of interest due upon a note places the note upon a footing with overdue paper. First Nat. Bank v. Co. Commissioners, 14 Minn. 77; Newell v. Gregg, 51 Barb. 263; Hart v. Stickney, 41 Wis. 630.

But see Nat. Bank v. Kirby, 108 Mass. 497 (*semble*); Boss v. Hewitt, 15 Wis. 280, *contra.* — Ed.

said check at other times than that before stated." It was not contended that the plaintiffs "knew or had reason to know the circumstances under which the check was given or transferred."

The defendants asked the judge to rule "that they might show that the check was given without consideration, and that, if in fact they received no consideration for it, the plaintiffs could not recover; that, if the check was passed to Dolliver for the purpose of having the check deposited and cashed in the bank at Rockport, Dolliver acquired no title thereto, and could not pass the same to the plaintiffs so as to give them a right to recover." But the judge found "that the check was received by the plaintiffs in due course of business, in payment of a debt, in good faith, and without knowledge of the origin or history of the check; and that after the check had been presented, the defendants, with full knowledge of the time when it was presented, promised the plaintiffs to pay it." And he declined to rule as requested by the defendants, who, after a verdict for the plaintiffs, alleged exceptions.

R. D. Smith, for the defendants.

H. C. Hutchins, for the plaintiffs.

BIGELOW, C. J. The rule that a bill of exchange or promissory note, taken when it is overdue, is subject in the hands of the holder to all the equities attaching to it as between the original parties, or as against the person from whom the holder receives it, does not apply to check on banks, when they are taken within a brief period of time after their date. These, although payable on demand, are not treated as being dishonored or overdue on the day, or immediately after the day, of their date. A holder, who takes a check in good faith and for value several days after it is drawn, receives it without being subject to defences of which he has no notice before or at the time his title accrues. This is the rule of law as settled by uniform practice and the current of decisions in the courts of the United States. *In re Brown*, 2 Story, 502; *Chit. Bills* (12th Am. ed.), 222 and note; *Byles on Bills* (5th Am. ed.), 130, note.

It is not contended that the defendants sustained any injury or loss by the omission to present the check immediately after it was drawn, and the evidence was plenary of a waiver by the defendants of an earlier presentment of the check than was made by the plaintiffs.

*Exceptions overruled.*¹

¹ In the following cases, checks were held to have been transferred within a reasonable time: *Rothschild v. Corney*, 9 B. & C. 388 (6 days); *Himmelmänn v. Hotaling*, 40 Cal. 111 (1 day); *First Nat. Bank v. Harris*, 108 Mass. 514 (2 days).

In the following cases, the transfer was held not to be within reasonable time: *Down v. Halling*, 4 B. & C. 330 (5 days); (but see *Bank of Royal v. Fagan*, 7 Moo.

ELISHA W. CHESTER, RESPONDENT, v. CHARLES H. DORR
AND OTHERS, EXECUTORS OF JAMES A. DORR, DECEASED, AP-
PELLANTS.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1869.

[*Reported in 41 New York Reports, 279.*]

APPEAL from a judgment of the General Term of the New York Superior Court, affirming a judgment for the plaintiff upon the report of a referee.

This action was originally brought by one Harrington, plaintiff's assignor, against James A. Dorr, the defendant's testator, as indorser of eight promissory notes made by the Northfield Brick Company.

The plaintiff, Harrington (who is now deceased), assigned his claim to Elisha W. Chester, in whose name the suit is now prosecuted.

The defendant, Dorr, is now deceased; and the action is continued against his executors.

The following was the form of the notes:—

"\$500. NORTHFIELD, January 15, 1858.

"Eight months after date, we promise to pay to the order of James A. Dorr five hundred dollars, at No. 34 Pine Street, New York city.

"THE NORTHFIELD BRICK COMPANY.

BY JAMES A. DORR, *Treasurer.*

"Indorsed,

"Protest waived,

JAMES A. DORR."

The referee found as facts that the Northfield Brick Company, in or about the month of June, 1858, made the eight several promissory notes which are described and set forth in the complaint in this action, bearing the dates and for the amounts, and payable at the times and place in the complaint stated, and which amount in all to the sum of \$4,000. Second, that, at the time of the making of the notes, the company were indebted to Michael A. Myers in the sum of \$4,000, which indebtedness was evidenced by notes given by the company and held by Myers, and which were past due and unpaid. Third, that Myers surrendered to the company the past due notes, so held by him,

P. C. 61, 72); *First Nat. Bank v. Needham*, 29 Iowa, 249 (5 months); *Vairin v. Hobson*, 8 La. 50 (25 days); *Skillman v. Titus*, 32 N. J. 96 (2½ years); *Cowing v. Altman*, 1 Th. & C. 494 (14 months); *Lancaster Bank v. Woodward*, 18 Pa. 357 (1 year).

See *Serrell v. Darbyshire Co.*, 9 C. B. 811; *Lester v. Given*, 8 Bush, 357; *Arents v. Commw.*, 18 Grat. 750, 782.—ED.

and received therefor the notes in the complaint mentioned and described; and that the last-mentioned notes were indorsed by the defendant, James A. Dorr, at the request of Myers, and to enable him, Myers, to use them. That no consideration was paid to the defendant for so indorsing the notes; but that Myers gave to the company, for the notes in the complaint described, so indorsed by defendant, the past due and unpaid notes of the said company hereinbefore mentioned. Fourth, that there was no agreement between Myers and defendant by which Myers was restricted as to the use which he might make of the notes in the complaint mentioned, or any or either of them. Fifth, that Myers continued to hold the notes in the complaint described until after their maturity; and that, after such maturity of the notes, Myers transferred and delivered the same to the plaintiff, Henry J. Harrington, for a full and valuable consideration, equal in amount to the amount of the notes paid by the plaintiff to the said Myers therefor.

Elisha W. Chester, the respondent in person.

Benjamin D. Silliman, for the appellant.¹

WOODRUFF, J. Mr. Justice Story, in his Treatise on Promissory Notes, § 178, thus states the difference between the legal effect of the transfer of a promissory note before and after maturity: "If the transfer is made before the maturity of the note to a *bona fide* holder for a valuable consideration, he will take it free of all equities between the antecedent parties, of which he has no notice.

"If the transfer is after the maturity of the note, the holder takes it as a dishonored note, and is affected by all the equities between the original parties, whether he has any notice thereof or not. But . . . it is not to be understood by this expression that all sorts of equities existing between the parties, from other independent transactions between them, are intended; but only such equities as attach to the particular note, and, as between those parties, would be available to control, qualify, or extinguish any rights arising thereon."

The learned author gives this as the final conclusion, from the numerous cases cited by him, an examination of which shows that it is only after some difference of opinion that it has come to be deemed settled. Or as Mr. Chitty says of the opinion of Buller and Ashurst, JJ., in *Brown v. Davis*, expressed when Lord Kenyon doubted its broad extent, "This latter opinion is now the law." That opinion was to the effect "that, where a note is overdue, that alone is such a suspicious circumstance as makes it incumbent on the party receiving it to satisfy himself that it is a good one; otherwise, much mischief might arise." "If a note indorsed be not due at the time, it carries no suspicion

¹ The report of the case has been slightly abbreviated. — Ed.

whatever on the face of it; and the party receives it on its own intrinsic credit. But if it is overdue, though I do not say that by law it is not negotiable, yet certainly it is out of the common course of dealing, and does give rise to suspicion. . . . Generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him."

The foundation of the rule, which distinguishes commercial paper from ordinary common-law choses in action, is in harmony with the law thus stated: the holder of the former is protected against any inquiry into its previous history, and is warranted in giving it full faith, according to its tenor, because commercial convenience and the importance of the free and unembarrassed use of commercial credits require it; and on this the mercantile customs, which ripened into the law-merchant, were founded. These reasons, however, could have no application to paper which had been dishonored. The credit it was adapted to invite is spent; and the very fact of dishonor is inconsistent with the purposes which the rule was intended to subserve.

The rule is simple and convenient of application, is in no sense inconsistent with the usefulness of negotiable paper for the purposes for which it is intended, and, as it seems to me, is a just security against mischief and fraud.

In the terms in which it is above stated, it includes the defence of want of consideration, whenever that renders the note invalid in the hands of him who holds it, when it becomes due. Such want of consideration is an inherent defect in the contract itself. Or, in the language of the rule, attaches to the note itself in the hands of one for whose accommodation the note is made, and does not, like a set-off or other collateral matter apart from the note, arise out of an independent transaction.

But the same learned writer above referred to states that the mere fact that an accommodation note has been indorsed after it became due does not of itself, without some other equity in the maker, defeat a recovery by the indorsee. Story, § 194. And Mr. Chitty states that it has been so decided. The cases of *Charles v. Marsden*, *Sturtevant v. Ford*, and *Caruthers v. West*¹ are in support of the proposition.

These are the cases upon the authority of which the present case was decided below.

I am constrained to say that I am not satisfied that such an exception to the rule is either just or called for by any principle; nor am I at all convinced by the reasons assigned for the exception.

That the maker or indorser of a note for the accommodation of another should be held to the terms of his own indorsement according to

¹ 11 Q. B. 143.

their just interpretation, I fully agree. That one who receives such paper before maturity should not be affected by the mere fact that it was made or indorsed without consideration, I equally agree. That when a party lends his note or indorsement to another without restriction as to its use, he authorized the negotiation thereof in any manner which may serve the convenience or credit of the borrower, may be conceded.

From this latter concession, it is argued that such a lending of one's name is furnishing a continuing guarantee of the payment of the note, irrespective of its terms as to time of payment, and is therefore binding whenever it is transferred, and however long after it has become payable and been dishonored; that the absence of express restriction warrants the inference that the making or indorsement was to enable the borrower to use it whenever thereafter it suited his pleasure; and so "enforcing its payment is in accordance with the object for which the note was, as matter of accommodation, made or indorsed;" and in the discussion in England it has been suggested that, supposing an accommodation acceptance to remain in the hands of the party accommodated, it may be treated as giving authority by implication to use it thereafter, as his convenience or needs may require.

In respect to the last suggestion, two observations are pertinent: first, it begs the question; for, assuming the rule to be that he who receives a note or bill after dishonor acquires no better title to recover thereon than he has from whom it was received, then there is no reason why the accommodation maker or indorser should not treat the note in the hands of the borrower, after maturity, as *functus officio*, and mere waste paper. And, second, how is the maker or indorser in such case to withdraw his note or indorsement? Is he to be driven into a court of equity, and to praying out an injunction, to prevent a subsequent transfer? I think not. Take the present case. The note itself was the property of the holder (Myers) at its maturity, and was a valid note, in his favor against the maker. The indorsement of the defendant (the appellant's testator) was material as a transfer of title, although, being made for Myers's accommodation, it could not be enforced against such defendant as indorser. I cannot agree that it was incumbent on the defendant to go into a court of chancery to compel Myers to suffer a writing of the words "without recourse," or an equivalent expression, as a qualification of such indorsement.

As to the other reason, it is even less satisfactory, because it proceeds, I think, upon an entire misconstruction of the act of making or indorsing a note for the accommodation of another. Its purpose and object are to obtain credit for such other, or to enable him to do so. The very terms of the note declare the credit it is intended to procure, — that is to say, until the maturity of the note. Within that range,

the making or indorsement being unrestricted as to its use, the borrower may use it as his exigencies require; and a transferee may receive it in reliance upon the undertaking which is imported by its terms.

But the very term of payment contained in the note imports that the accommodation party undertakes that the note shall be paid at its maturity, and that he who then holds the note shall have recourse to him, if it be not then paid. Where the accommodation (as in the present case) is by indorsement, that is the precise contract; viz., that the note shall be paid at maturity, and not that it shall be paid at any future time. If the note be not paid at maturity, the contract is broken; and if he who then holds it can recover thereon, then his right of recovery may be transferred to another; and the recovery of the latter will be, not because the accommodation indorser undertook that the note should be paid to him, or should be paid at some date after it was due, but because a valid cause of action, existing in favor of the holder at maturity, has been transferred to him.

It is not according to the intent or meaning of an indorsement for another's accommodation to say that the indorser intends to give the use of his credit for any other period than that limited in the note, or that such an indorsement imports authority to use it, when that period has elapsed.

One may be willing, by indorsement, to guarantee the solvency of another for sixty days or for six months, and yet he would wholly refuse to do so for a period of two years. And accordingly, when such accommodation is given, it is a most material circumstance that the time during which the borrower is at liberty to obtain credit on the note is fixed by the limitation of the time of payment therein.

I deem the just view of the subject to be that, when a note has become due and is dishonored, the rights and responsibilities of the parties thereto are fixed. The note then loses the chief attribute of commercial paper. It is no longer adapted to the uses and purposes for which such paper is made, and in respect of which it is important that it should circulate freely. And, thereafter, he who takes it, takes it with knowledge of its dishonor, with obvious reason to believe that there exists some reason why it was not paid to the holder, and takes it with just such right to enforce it as such holder himself has, and no other.

In thus stating my views, I am not insensible of the apparent authority for the decision made below; but I am also aware that the judges in England have not been at all agreed on the subject, and have expressed doubt of the correctness of the decision in *Charles v. Marsden*, upon which the other two cases above referred to were decided. The cases largely collected in the notes to *Chitty* in the recent edition warrant, I think, the dissatisfaction I have expressed.

No case in this State has called for a decision of the question ; and yet, in *Brown v. Mott* ¹ and in *Grant v. Ellicott*,² the case of *Charles v. Marsden* is referred to without disapprobation, and the proposition derived therefrom is stated ; but in neither was the point now raised before the court, for in neither did it appear that the plaintiff took the note after it became due.

And that in other States in this country such an exception to the general rule first above stated is repudiated, see *Brown v. Hastings*,³ *Britton v. Bishop*,⁴ *Odiorne v. Howard*,⁵ *Cummings v. Little*,⁶ *Vinton v. King*, *Kellogg v. Barton*.⁷ And the general proposition, that he who takes a note when overdue takes it subject to all defences inherent in the note, or arising out of any agreement with the holder, expressed or implied, and relating thereto, or in another form, that such an indorsee obtains no greater or other rights than his indorser had in it at the time of the indorsement, has been stated as law in cases almost without number. It will perhaps suffice to refer to two from the Supreme Court of the United States. *Andrews v. Pond* ⁸ says of the indorsee of a dishonored bill : “ If he chooses to receive it, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he receives it.” *Fowler v. Brantley*.⁹ “ A note overdue or bill dishonored is a circumstance of suspicion to put those dealing for it afterward on their guard, and in whose hands it is open to the same defences it was in the hands of the holder when it fell due. After maturity, such paper cannot be negotiable ‘ in the due course of trade,’ although still assignable.” See also *Foley v. Smith*.¹⁰

In my own opinion, the just rule, and the rule resting on the soundest principle, requires us to reverse. The supposed exception to the general rule rests on neither reason nor, as I think, on authority, — certainly not in this country.

It was suggested by the counsel for the respondent that, as matter of fact, the defendant’s indorsement was not without consideration, and for the accommodation of Myers, who held the note at maturity.

The finding of the referee on that subject is conclusive in this court ; and that finding is that the indorsement was made without consideration, at Myers’s request, and to enable Myers to use the notes. This is but a statement that the defendant indorsed the notes for the accommodation of Myers. It was so treated in the court below ; and it is an unwarranted assumption to say that possibly the defendant had some other inducement to indorse the notes, in order that the plaintiff might accept the notes, and give credit to the maker thereof, who was his debtor.

¹ 7 J. R. 361.² 7 Wend. 227.³ 36 Pa. 285.⁴ 11 Vt. 70.⁵ 10 N. H. 343.⁶ 45 Me. 183.⁷ 94 Mass. 527.⁸ 13 Pet. 79.⁹ 14 Pet. 321.¹⁰ 6 Wall. 492.

MURRAY, J., also read an opinion for reversal.

GROVER, LOTT, JAMES, and DANIELS, JJ., concurred for reversal.

MASON, J., thought the law settled in this State in favor of the plaintiff by the cases (7 Johns. 361; 7 Wend. 227; and 1 Hill, 513), and was for affirmance.

HUNT, C. J., was also for affirmance. He did not approve of construing the defendant's contract as conditioned upon transfer before due.
*Judgment reversed.*¹

NATIONAL BANK OF FORT EDWARD, RESPONDENT, v. THE
WASHINGTON COUNTY NATIONAL BANK, APPELLANT.

IN THE SUPREME COURT, NEW YORK, NOVEMBER TERM, 1875.

[*Reported in 5 Hun, 605.*]

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

This action was brought to recover the amount of a certificate of deposit, of which the following is a copy:—

“CERTIFICATE OF DEPOSIT.

“No. 20,186. Washington County Bank, Union Village, N. Y., April 4, 1863.

“This certifies that J. K. Sanborn, agent of George Paige, has deposited in this bank five hundred dollars to the credit of said agent, payable on the return of this certificate properly indorsed.

“\$500.

EDWIN ANDREWS, *Cashier.*”

A payment of \$215 had been made upon the certificate by the bank, on the 20th September, 1864.

The certificate was transferred for value by the said Sanborn to the plaintiff, on the 20th October, 1870, without any knowledge or notice of said payment on the part of the plaintiff.

The only question litigated on the trial was whether, as against the plaintiff, the defendant had a right to have said payment applied upon the certificate. The justice who tried the cause disallowed said claim of defendant.

¹ *Glasscock v. Smith*, 25 Ala. 474; *Battle v. Weems*, 44 Ala. 105; *Barnet v. Offerman*, 7 Watts, 130; *Bower v. Hastings*, 36 Pa. 285; *Hoffman v. Foster*, 43 Pa. 137, *accord*.

Brown v. Mott, 7 Johns. 361 (*semble*); *Grant v. Ellicott*, 7 Wend. 227 (*semble*), *contra* are overruled.—ED.

Boies and *Thomas*, for the appellant. It is now settled in this State by the cases of *Herrick v. Woolverton*¹ and *Wheeler v. Warner*² that a note payable on demand, with or without interest, must be presented within a reasonable time, or it will be deemed due and dishonored, so that a negligent transferee will take it subject to all equities existing between the original parties. *Himmelman v. Hotaling*,³ *Poorman v. Mills*; ⁴ *Chitty on Bills*, 379; *Story on Prom. Notes*, § 207, note 1; *Story on Bills of Exch.*, §§ 232, 335; 1 *Pars. on Cont.* [2d ed.], 217, note 1; *Pars. on Notes and Bills*, 264, 266. The certificate was outlawed at the time it was transferred to the plaintiff. The Court of Appeals has recently decided unanimously, without a dissenting voice, "that a promissory note payable on demand, whether with or without interest, is due forthwith; and an action thereon against the maker is barred by the Statute of Limitations, if not brought within six years after its date." *Wheeler v. Warner*,⁵ *Howland v. Edmonds*,⁶ *Herrick v. Woolverton*,⁷ *Payne v. Gardner*.⁸ The said certificate of deposit possesses all the requisites of a negotiable promissory note, payable on demand, and must be regarded and treated as such. *Barnes v. Ontario Bank*,⁹ *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*,¹⁰ *Bank of Orleans v. Merrill, President, &c.*, *Poorman v. Mills & Co.*,⁴ *Himmelman v. Hotaling*.³

A. D. Wait, for the respondent. In the ordinary case of a deposit with a bank or private person, the money is not due or payable until it is demanded. And when a certificate of deposit is issued like the one in question, which by its terms is due and payable only on "its return properly indorsed," and not before, it is not to be regarded as dishonored or subject to equities between the original parties in the hands of a *bona fide* holder without notice. It is a continuing security, and was not due or payable until it was by plaintiff presented for payment by plaintiff properly indorsed. *Payne v. Gardner*.⁸ The delay in presenting it for payment is of no importance. It was only payable "on its return properly indorsed." 14 N. Y. 624, *per* Denio, J.

LEARNED, P. J. In the strict meaning of the word, borrowed from the civil law, deposit is the delivery of a thing for custody, to be re-delivered on demand, without compensation. Such are deposits of securities or valuables in a bank for safe keeping. But ordinary money deposits in banks are clearly different, in this respect: the identical money deposited is not to be returned, only its equivalent; and the money deposited becomes the money of the bank. The bank really becomes debtor to the depositor. Still, however, the bank is, in theory,

¹ 41 N. Y. 581.² 47 N. Y. 519.³ 40 Cal. 111.⁴ 39 Cal. 345.⁵ 47 N. Y. 519.⁶ 24 N. Y. 307.⁷ 41 N. Y. 581.⁸ 29 N. Y. 167.⁹ 19 N. Y. 152.¹⁰ 14 N. Y. 623.

supposed to have the money on hand, ready to deliver when called for, and hence it is that, as in the case of a true deposit, an actual demand must be made before the bank can be required to pay. This is the plain and undoubted understanding of all parties. The depositor puts his money in the bank for better security, instead of keeping it himself. And, when he actually demands it, the bank is to pay, not before. The bank may also give a certificate of deposit. When they do this, and when, as in this case, they make the certificate payable on its return, properly indorsed, they have then added to their original undertaking as a depositary an agreement that they will pay the deposit to the holder of that certificate, properly indorsed. They are, therefore, under a liability as depositary to be ready to redeliver the money whenever demanded; and, further, to deliver it to any holder of that certificate, properly indorsed. It follows, therefore, that they are liable to a *bona fide* holder of the certificate, notwithstanding a payment to the original depositor. It was urged by the defendants that the certificate was payable forthwith; that after the lapse of an unreasonable time (in this case seven years) it was presumed to be dishonored, and therefore that the assignee took it subject to all equities. We think not. The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank for safe keeping, which are to be retained until the depositor actually demands them. Such a certificate is not dishonored until presented. Our statutes recognize depositors as a distinct class from other creditors, and sometimes give them special privileges; and this is because, although in fact the bank is a debtor, yet it is supposed to be more, and to be a depositary, liable to redeliver at any time on demand.

We think, therefore, that the judgment should be affirmed, with costs.

Present: LEARNED, P. J., BOARDMAN and BOCKES, JJ.

*Judgment affirmed, with costs.*¹

¹ 29 N. Y. 167, 168, &c.

² *Brummagim v. Tallant*, 29 Cal. 503; *Tripp v. Curtenius* (Michigan, 1877), 9 Chic. Leg. N. 339, *contra*.

See *Poorman v. Mills*, 39 Cal. 345. — ED.

CHAPTER V.

EXTINGUISHMENT.

ANONYMOUS.

IN THE UPPER BENCH, HILARY TERM, 1652.

[*Reported in Style*, 366.]

THE question being upon a motion in arrest of judgment in an action brought for money paid upon a bill of exchange brought by a wrong person, to whom the bill belonged not, and a verdict for the defendant, Twisden said that, if money be paid to a wrong person upon a bill of exchange, if the wrong person¹ do show the bill, by the custom of merchants this is a good payment; and the party that paid it shall not be charged again.

WILD. It is doubtful whether the custom be so or not.

But ROLL, C. J., said: Here is a verdict for the custom; and therefore it were well if the parties would agree to a new trial; but, if they will not, take your judgment, because the verdict hath found it a good custom.²

¹ The bill in this case was presumably payable to bearer, or indorsed in blank. — ED.

² Payment to the apparent holder, *i. e.* to one in possession of a bill or note payable to bearer or indorsed in blank, extinguishes the instrument. *Lovell v. Martin*, 4 Taunt. 799 (*semble*); *Owen v. Barrow*, 4 B. & P. 101; *Snow v. Peacock*, 2 C. & P. 221 (*semble*); *Leonard v. Leonard*, 14 Pick. 280 (*semble*); *Eastman v. Plumer*, 32 N. H. 238; *Cone v. Brown*, 15 Rich. 262; *Planters' Bank v. Mapey*, 2 Heisk. 360; *King v. Fleece*, 7 Heisk. 273; *Lamb v. Matthews*, 41 Vt. 42; *Greve v. Schweitzer*, 36 Wis. 554. See also *Vinson v. Vives*, 24 La. An. 336.

But payment to the ostensible agent of the payee or special indorsee is a good payment only when the agent was expressly or impliedly authorized to receive payment. *Carver v. Carver*, 53 Ind. 241; *Rumsey v. Schmitz*, 14 Kas. 542; *Graham v. Sav. Inst.*, 46 Mo. 186; *Davis v. Lane*, 8 N. H. 224; *Doubleday v. Kress*, 50 N. Y. 410; *Wardrop v. Dunlop*, 1 Hun, 325. — ED.

GOMEZ SERRA v. BERKLEY.

IN THE KING'S BENCH, HILARY TERM, 1743.

[Reported in 1 Wilson, 46.]

THIS was an action upon a promissory note of £130, for value received, payable by defendant to Collison and Lambert, or order, and by them indorsed to the plaintiff. Upon *non assumpsit*, this cause came on to be tried at Guildhall, when the case upon the evidence appeared to be thus: viz., that this note was drawn by Berkley, and paid away to the plaintiff by Collison & Co.; that afterwards Collison & Co. took it back again, and paid the plaintiff his money for it; that, after this, the plaintiff sold goods to Collison & Co, who, a second time, gave the plaintiff the same note for payment thereof; and afterwards, Collison & Co. failing, the plaintiff brought this action against the drawer; and the jury gave a verdict for the defendant, because the note had been once taken up and paid; and now it was moved for a new trial, because this is a note for value received, and there was no evidence whatever that the plaintiff knew of any transaction between the defendant and Collison & Co., or whether this was a lent note by the defendant to them; for it appeared to the plaintiff that the defendant was still liable to Collison and Lambert when they paid the plaintiff this note a second time; and the plaintiff ought to stand in their place. And so it was held; and a new trial was granted *per totam curiam*.

JOHNSON v. KENNION.

IN THE COMMON PLEAS, EASTER TERM, 1765.

[Reported in 2 Wilson, 262.]

ACTION upon the case upon a bill of exchange brought by Johnson, the indorsee, against Kennion, the drawer thereof, payable to Benson, or his order, who indorsed it to plaintiff, in order to get it discounted. Plaintiff delivered the bill to Baldwin, who advanced the whole money. Benson paid £232 to the plaintiff: then Baldwin redelivered the bill to the plaintiff, who repaid him the residue. There was a verdict for the whole £1,000 in the bill. Upon showing cause why

there should not be a new trial, the plaintiff, the indorsee, having been paid part of the sum in the bill,

CHIEF JUSTICE. Consider the nature of these contracts. They are negotiable bills, passing through the hands of divers persons; and though there are many indorsements on the bill, yet there is but one security for one sum of money; and he who has the possession of the bill may bring his action. Where there are many indorsers, the indorsees have a right of action in succession; but there is but one right of action under the bill against one person at one and the same time. The bill being in one indorsee's hand, the indorser pays a part; and the objection is that this ought to be considered as a payment for the drawer. But I think, *toto cælo*, it is otherwise, because the indorser is no servant, nor is agent to the drawer. Suppose Benson had paid the whole £1,000 to Johnson, and Benson's name had not been struck out, and an action had been brought in Johnson's name against the drawer, will you say the action will not lie? Suppose, after a recovery against Kennion, he had run away, could Benson have had a right to come against Johnson before any satisfaction? The bill is a security for every indorser as *cestui que trust*. I think it is a plain case that Johnson has a right to recover the whole money; and, when he receives it, he will have received £232 of Benson's money. The defendant has no reason to complain.

BATHURST, J., of the same opinion. You cannot split the bill so as to subject the party to different actions.

GOULD, J. The thing is very clear. When the defendant has paid the £1,000, there is an end of the contract. Where the drawer of the bill has paid part, you may indorse it over for the residue; otherwise not, because it would subject him to variety of actions.

A new trial was denied.¹



SMITH, ASSIGNEE OF BAGNALL AND HAND, v. SHEPPARD.

LONDON SITTINGS AFTER HILARY TERM, CORAM LORD MANSFIELD,
C. J., 1774.

[Reported in *Chitty, Bills* (10th ed.), 180, note.]

THE defendant was indebted to Bagnall and Hand, the bankrupts, in £30 for goods sold October, 1774. Comberstall, the bankrupts' servant, brought a bill of parcels in the same handwriting that all

¹ Reid v. Furnival, 1 Cr. & M. 538; Walwyn v. St. Quintin, 1 B. & P. 652, *accord*. See Hemming v. Brook, Car. & M. 57. — ED.

their former bills had been, and fraudulently said his master was in want of cash, and desired he would accept a bill of exchange, which C. immediately drew, signed with his own name, payable to Bagnall and Hand, or order, and gave a receipt on the bill of parcels. The defendant accepted the bill; and C. afterwards carried it away. The bill was brought to the defendant by Spencer, who had it in payment for goods. The names of Bagnall and Hand were indorsed on the bill, and defendant paid it; but that indorsement was a forgery. It was the bankrupts' practice to deliver in their bills at Christmas; but at Christmas, after this transaction, no bill was delivered to defendant. No evidence appeared in whose handwriting the indorsement was; but it did not appear to be like the bankrupts' or Comberstall's.

LORD MANSFIELD. Each party is innocent. The question is on whom the loss must fall. It should be on him who is most in fault. It is admitted that Comberstall used to receive money, but not draw bills. Here is a bill that does not trust Comberstall at all, for it is to pay to the order of the bankrupts: in this case, if he had been used to draw bills, that would not vary the case, because it is not pretended that the indorsement was by Comberstall; then he that takes a forged bill must abide by the consequence, for the man whose name is forged knows nothing of it. If a bill payable to bearer be lost, and found by another person in the street, who carries it to the banker that drew it, and he pays, it is a good payment; for it is the owner's fault that he lost it. In this case, the name of Bagnall and Hand is forged: it could not be paid without their hand; and the defendant has been negligent in inquiries whether it was their hand or not. The ground which defendant relies on is that the bill was not delivered at Christmas, as usual; but that is of no weight, because it had been delivered before in October.

*Verdict for plaintiff.*¹

¹ Cheap v. Hanley, 3 T. R. 127; Forster v. Clements, 2 Camp. 17; Johnson v. Windle, 3 B. N. C. 225; Foltier v. Schroder, 19 La. An. 17; Graves v. American Bank, 17 N. Y. 205; Palm v. Watt, 7 Hun, 317, *accord*.

See E. I. Co. v. Tritton, 3 B. & C. 280; Morrison v. Buchanan, 6 C. & P. 18; Smith v. Union Bank, 1 Q. B. D. 31; 60 L. T. 82. — Ed.

BECK v. ROBLEY.

IN THE KING'S BENCH, TRINITY TERM, 1774.

[Reported in 1 Henry Blackstone, 89, note (a).]

INDORSEE of a bill of exchange against the acceptor. It appeared in evidence that Brown drew a bill of exchange upon Robley, payable to Hodgson, or order; which was accepted by Robley, and indorsed by Hodgson. Not being paid when due, Hodgson returned the bill, and Brown took it up, Hodgson's indorsement still remaining. Brown afterwards gave the bill to Beck, as a security for money; and, when he gave it, acquainted Beck with the whole transaction, but did not tell him whether Robley had effects in his hands. Upon this evidence, the jury found a verdict for the defendant, being of opinion that the acceptor was discharged by Brown's taking up the bill, and that there was an end of its negotiability.

Mansfield moved for a new trial, on the ground that the jury had mistaken the law. He insisted that the drawer of a bill, which in a course of circulation came back to his hands, might maintain an action as indorsee. [MR. J. ASHHURST said he remembered several instances of such actions.] And here the bill was indorsed to Brown, who might either have maintained his action as indorsee, or put it again in circulation, unless the acceptor's refusal to pay could prevent the negotiability of it, which certainly could not be the case.

Wallace, contra. A bill of exchange is payable at a given time, and is till that time negotiable. If payment is then refused, it goes back to the drawer, and when he has taken it up there is an end of it. If it were otherwise, Hodgson would be liable, who certainly never meant that his name should give a title to the bill after it had been returned to the drawer.

LORD MANSFIELD. I first thought at the trial that the action was maintainable, but am now clearly satisfied that the jury did right. When a draft is given payable to A., or order, the purpose is that it shall be paid to A., or order; and when it comes back unpaid, and is taken up by the drawer, it ceases to be a bill. If it were negotiable, Hodgson would be liable, for which there is no color.

*Rule for a new trial refused.*¹

¹ *Mickelberry v. Shannon*, 25 Ga. 237 (*semble*); *Gardner v. Maynard*, 7 All. 456; *Price v. Sharp*, 2 Ired. 417, *accord*.

See *Louviere v. Lowbray*, 10 Mod. 36. — ED.

DE SILVA *v.* FULLER.

AT NISI PRIUS, EASTER SITTINGS, 1776.

[*Reported in 1 Chitty, Jr., 392.*]

TROVER for a bill, draft, or check, drawn by one Cox on the defendants, who were bankers, payable to "No. 437, or bearer, on demand." It was drawn the 17th June, but dated the 18th. On the 17th the plaintiff received it, that day he lost it, and the same day (the 17th) it was presented to the defendants, who paid it. It was proved to be contrary to the usual course of business to pay drafts before the day on which they were dated, and on that ground the plaintiff had a verdict.

BACON *v.* SEARLES.

IN THE COMMON PLEAS, NOVEMBER 27, 1788.

[*Reported in 1 Henry Blackstone, 88.*]

ASSUMPSIT by the indorsee of a bill of exchange against the acceptor.

The bill was drawn for £95 10s. by one Seymour on the defendant, payable to his own order, by him indorsed to the plaintiff, and accepted by the defendant. After it became due, Seymour the drawer paid the plaintiff £60 10s. as part of the contents; the defendant paid the residue, with interest, into court, and pleaded the general issue.

This cause was tried before Lord Loughborough, at Guildhall, at the sittings in the present term, and a verdict found for the defendant, with leave to move the court to enter a verdict for the plaintiff.

This motion was accordingly made by *Bond*, Serjt., who contended that the payment by the drawer was not a discharge of the acceptor, he having, by his acceptance, made himself liable to the holder of the bill. The contract between the indorser of a bill and the indorsee was, he argued, totally different from that between the drawer and acceptor; the former being merely a contract of indemnity, but the latter an undertaking that the acceptor has effects of the drawer in his hands to the amount of his acceptance, by which he gives currency to the bill, and makes himself liable for the whole. *Parminter v. Symons*. The payment of the drawer in the present case gave him a lien on the bill for the sum he had paid: the holder also had a lien for the whole amount; but as a personal contract cannot be severed and made the ground of two actions; the holder must bring the action

for the whole, and be considered as a trustee for that part which the drawer had paid. *Johnson v. Kennion*, *Hawkins v. Cardy*.

WILSON, J., mentioned the case of *Beck v. Robley* as being contrary to Bond's argument.

LORD LOUGHBOROUGH. When a bill of exchange is drawn, the drawer orders the acceptor to pay so much of his money to a third person; but, if he anticipates the acceptor and pays the money himself, he thereby releases the acceptor from his undertaking: so that, if the acceptor were to pay the bill after notice given him that the drawer had already paid it, an action would lie for the drawer against the acceptor to recover back the money so paid. Another reason which weighs much with me is the great mischief which would ensue to merchants, among whom accommodation bills are circulated to a vast extent, if after a bill had been taken up by the drawer the acceptor should be liable to be called upon for payment.

GOULD, J. The doctrine contended for would go the length of proving that the holder of a bill, having received the whole money from the drawer, might recover it again from the acceptor.

HEATH, J., of the same opinion.

WILSON, J. I had no doubt on this question till the case of *Johnson v. Kennion* was cited; but that was done away by what has fallen from my lord. Indeed, that case is inaccurately reported; and I am much disposed to think that the Chief Justice never said what he is there stated to have said. That also might have been the case of a promissory note instead of a bill of exchange. But there my brother Gould says that, where the defendant had paid the amount of the bill, there was an end of the contract: so here, the drawer having paid part, and the acceptor the residue, the contract was at an end, the acceptor being the agent of the drawer. There also my brother Gould says, where the drawer of a bill has paid part, you may indorse it over for the residue. But that is for the protection of the indorsee. Here the plaintiff knew how much was due: no such special indorsement was necessary. The case then of *Johnson v. Kennion* does not influence the present; but, even if it did, I shall think the justice of this cause much in favor of the defendant. The plaintiff has received all the money, and yet desires to be a trustee for the drawer, and receive again from the acceptor that which the drawer has paid. Besides, though the presumption is that the acceptor of a bill of exchange has effects of the drawer in his hands at the time of the acceptance, yet in fact the effects are often sent after the acceptance.

*Rule refused.*¹

¹ Ex parte Tayler, 1 DeG. & J. 302, *accord*.

But see *Purrsford v. Peck*, 9 M. & W. 201, *per* Lord Abinger, C. B., *contra*. — Ed.

CALLOW v. LAWRENCE.

IN THE KING'S BENCH, JUNE 23, 1814.

[Reported in 3 Maule & Selwyn, 95.]

ASSUMPSIT on a bill of exchange, dated the 28th of July, 1812, drawn by one Pywell, for £65, payable to his own order, seven days after date, accepted by the defendant, and indorsed by Pywell to the plaintiff. Plea, *non assumpsit*. At the trial before Lord Ellenborough, C. J., at the London sittings after last term, the plaintiff established his case by the usual proof of the several handwriting. The defence was this: on the 29th of July, Pywell indorsed the bill to Taylor, who discounted it for him, and Taylor indorsed it to Barnett, who, about two days before it became due, paid it short into his bankers. The bankers presented it for payment when it became due, and upon its being dishonored returned it to Barnett. About a week afterwards, Pywell called on Barnett and paid him the amount of the bill, upon which Barnett drew his pen through his own and Taylor's indorsement, and delivered up the bill to Pywell. It was proved that on the 20th of February, 1813, the bill was seen in the hands of Pywell. The jury under his Lordship's direction found a verdict for the plaintiff. On a former day in this term, the Attorney-General obtained a rule *nisi* for a new trial, on the ground that Pywell having taken up the bill it ceased to be negotiable, and so the defendant was discharged upon the bill; and he cited *Beck v. Robley*: 2dly, that the bill should have been restamped upon being reissued after having been taken up.

Scarlett (with him *Comyn*) now showed cause; and he distinguished this case from *Beck v. Robley*, because there the bill was drawn payable to the order of a third person, who indorsed it, and if, after it was taken up by the drawer, it had continued negotiable in his hands, that third person would have been liable, for which Lord Mansfield said there was no color. But here the bill being payable to the drawer's own order, and indorsed by him, it continued negotiable in his hands upon his own indorsement; and, if he passed it, there was no reason why he should not be liable. And in *Gomez Serra v. Berkeley* the point in question seems to have been settled; for there the payees of a promissory note, payable to them or order, indorsed it to the plaintiff, and afterwards paid the note and took it back, and then passed it a second time to the plaintiff; and it was held that the plaintiff might recover against the maker of the note, for the maker of the note was still liable to the payees when they paid the plaintiff this note a second time, and the plaintiff ought to stand in their place. So here, Pywell,

the drawer of this bill payable to his own order, stands in the same situation as did the payees of the note in that case, which was payable to their order, and therefore here also the defendant, the acceptor, being still liable to Pywell when he paid this bill to the plaintiff, the plaintiff ought to stand in Pywell's place. And Pywell might have sued the defendant on this bill, because the defendant's acceptance amounts to an express promise to pay; and so, if Pywell might sue, the plaintiff may, subject only to all the equities as between Pywell and the defendant. *Brown v. Davies*. Therefore, it appears that *Beck v. Robley* stands on its own peculiar grounds.

Jarvis, contra (with him the *Attorney-General*), insisted that the question was not whether Pywell could have sued, but whether the plaintiff could, who it appeared had taken the bill more than six months after it was due and had been taken up. And in *Brown v. Davies* he observed that the bill had not been taken up and paid, but only noted for non-payment. And *Gomez Serra v. Berkeley* turned on this point, that there was no evidence that the plaintiff knew of any transaction between the defendant and the payees to discharge the defendant. And though *Beck v. Robley* admits of the distinction taken, yet it was not decided upon that, but upon the general principle that if a draft be given payable to A., or order, the purpose is that it shall be paid to A., or order, and when it comes back unpaid and is taken up by the drawer it ceases to be a bill. At all events, this bill should have been restamped when it was reissued, for it was then a new bill.

LORD ELLENBOROUGH, C. J. A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill, and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers. In *Beck v. Robley*, if the bill had been negotiable, it would have had the effect of rendering Hodgson liable upon his indorsement, which in point of law was discharged by Brown's taking up the bill. That I think is the distinction, and disposes of that case. Here Pywell the drawer became the purchaser of the bill when he paid and took it up out of Barnett's hands: the bill was not paid by him *animo solvendi* in order to extinguish it, but only to redeem himself from the situation in which he stood upon the bill; and, the bill being indorsed by him, it is not necessary to its being negotiable that any other party should be prejudiced. I own, I much doubted when the rule was moved whether I had not been mistaken at the trial;

but I think, now that my attention has been called to the distinction in *Beck v. Robley*, that what I held was right

LE BLANC, J. *Beck v. Robley* was decided upon the consequence that would follow from holding the bill to be negotiable; namely, that Hodgson the indorser, whom there was no color to charge, must have been liable; and, striking out Hodgson's indorsement, the bill could not possibly be negotiable. As to the objection on the stamp, the answer is that this bill had not discharged its functions.

BAYLEY, J. I am of the same opinion. The bill was never discharged as between Pywell and the defendant, nor as between the plaintiff and defendant. The payment by Pywell to Barnett did not in legal effect strike out Pywell's indorsement, so as to render the bill no longer negotiable; as in *Beck v. Robley* the payment by Brown struck out the indorsement of Hodgson. When the bill came back to Pywell, he was remitted to his original rights.

DAMPIER, J. When the rule was moved, I was struck with the case of *Beck v. Robley*, and did not perceive the distinction; but the impression it made on me has been removed by the distinction pointed out by Mr. Scarlett; and it seems to me to make the whole difference. That case was decided upon the ground that Hodgson would be liable if the bill continued negotiable, but there is no such objection here. As to the other objection, it was not a new bill, and therefore a fresh stamp was unnecessary. *Rule discharged.*¹

FREAKLEY v. EDWARD FOX.

IN THE KING'S BENCH, FEBRUARY 11, 1829.

[*Reported in 9 Barnewall & Alderson, 130.*]

ASSUMPSIT. The first count of the declaration stated that the defendant, on, &c., made his promissory note, and thereby promised to pay on demand to one R. Reeves, in his lifetime, since deceased, or order, £300 and interest, and delivered the note to Reeves. That

¹ *Hubbard v. Jackson*, 4 Bing. 390; *Kirksey v. Bates*, 1 Ala. 303; *French v. Jarvis*, 29 Conn. 347; *Reichert v. Koerner*, 54 Ill. 306 (*semble*); *Wilkinson v. Daniels*, 1 Greene, 179; *Mead v. Small*, 2 Greenl. 207; *Eaton v. McKown*, 34 Me. 510; *Emerson v. Cutts*, 12 Mass. 78; *Guild v. Eager*, 17 Mass. 615 (overruling *Blake v. Sewell*, 3 Mass. 556, and *Boylston v. Greene*, 8 Mass. 465); *Cochran v. Wheeler*, 7 N. H. 202; *Hopkins v. Farwell*, 32 N. H. 425 (*semble*); *Havens v. Huntington*, 1 Cow. 387; *Williams v. Matthews*, 3 Cow. 260; *St. John v. Roberts*, 31 N. Y. 441 *Norton v. Downer*, 32 Vt. 26, *accord*.

See *Ellsworth v. Brewer*, 11 Pick. 316; *Penney v. Gregory*, 102 Mass. 186.

Reeves made his will, and appointed E. C., C. C., E. A., and Edward Fox executors thereof; and Reeves afterwards died; and thereupon the said E. C., C. C., E. A., and Edward Fox duly proved the will, and took upon themselves the burden of the execution thereof; and afterwards, and before the indorsement hereinafter next mentioned, to wit, on, &c., C. C., one of the said executors, died, and the said E. C., E. A., and Edward Fox, so being surviving executors of the last will and testament of Reeves, afterwards, to wit, on, &c., as such surviving executors, indorsed the note to the plaintiff, whereby, and by force of the statute, &c., defendant became liable to pay the money in the note specified to the plaintiff. The second count varied only by stating the indorsement to have been made by E. A., being one of the executors of Reeves. The defendant pleaded, thirdly, that R. Reeves, the testator, on, &c., duly made his last will, and thereof constituted and appointed the defendant, together with E. C., C. C., E. A., joint executors, and died without altering or revoking his said will; and that afterwards, and after the death of Reeves, and before the said supposed indorsement of the said promissory notes, defendant duly proved the will of Reeves, and took upon himself, together with E. C., C. C., and E. A., the burden of the execution thereof. Replication, that Reeves, by his said last will, after giving and bequeathing divers legacies to divers persons, gave all the residue of his personal estate to the said E. C. and C. C., their executors, administrators, and assigns, in equal shares, and that Reeves did not by his said will forgive the said defendant the said debts due to him upon and by virtue of the said promissory notes, and did not, in or by his said will, or by making the defendant one of the executors thereof, release or intend to release to him, the said defendant, the said debts, or either of them; and that the said several sums of money in the said notes mentioned, being and remaining respectively due, owing, and unpaid, the said defendant, after the death of the said Reeves, and before the said indorsements of the said notes, or either of them, to the plaintiff as aforesaid, to wit, on, &c., recognized and confirmed the said notes as valid and subsisting, and paid to the said co-executors certain sums of money as and for, and then and there, being interest on the said sums of money in the said notes specified, to wit, &c. And that, after the said payments of interest, the said E. C., E. A., and defendant, indorsed the said note in the first count mentioned, and E. A. indorsed the note in the second count mentioned to the plaintiff, as in the first and second counts respectively is alleged.

Demurrer and joinder.

Campbell, in support of the demurrer. The plea is a good answer to both the counts on the promissory note; and the replication does

not give any sufficient answer to it. In the declaration, the defendant is charged as maker of the note. It is not stated that the defendant indorsed the note. If it had been averred that the defendant, Edward Fox, indorsed the note, he could not have pleaded in abatement the non-joinder of his co-executors. It is clear, therefore, that the charge is not against him as executor. The allegation that the defendant indorsed the note is for the first time introduced in the replication. If that is meant to charge him as executor, it is a departure from the declaration. But, assuming that it may be held that the first count charges the defendant as an executor indorsing the note, the action is not maintainable; for the holder, by appointing the maker his executor, extinguished the debt; and there was no interest in the note which the executors could assign. *Wankford v. Wankford*,¹ *Cheetham v. Ward*,² *Sir John Nedham's Case*,³ where a distinction is taken between the appointment of a debtor to be executor or administrator. The former, being the act of the creditor, extinguishes the debt: the latter, being the act of the ordinary, does not. Then, as to the indorsement by one executor as alleged in the second count, it is true that in *Rawlinson v. Stone* it was resolved, after much debate, that an administratrix might indorse a promissory note; but there is no authority for saying that an indorsement by one of several executors can make them all personally liable.

F. Pollock, contra. The plaintiff is entitled to proceed against this defendant either as maker or indorser of the promissory note. It is argued on the other side that the appointment of a debtor as executor to the creditor is a release of the debt; but that doctrine does not apply to negotiable instruments. That the debt is not absolutely released is clear; for in equity the executor is held to be a trustee of the amount for the payment of debts or legacies. *Berry v. Usher*.⁴ But the remedy by action is gone; and on that account the idea of the debt being released has prevailed. *Com. Dig. Release A 2*; *Co. Lit. 264 b*. And it will be found that *Wankford v. Wankford*, and all the cases upon the subject, relate to debts not transferable. Now, although in general the action is gone, for the technical reason that an executor cannot sue himself, that does not apply where by indorsement the right of action may be vested in a third person. As to an indorsement by one of several executors, that must be sufficient in order to transfer the property in the note, as well as to release a debt or convey a term of years; and this objection is only applicable to the second count.

Cur. adv. vult.

The judgment of the court was now delivered by

¹ 1 Salk. 299.

² 1 B. & P. 630.

³ 8 Co. 134.

⁴ 11 Ves. 87.

LORD TENTERDEN, C. J., who, after stating the pleadings, proceeded as follows: On behalf of the defendant, it was contended that, by the appointment of the maker to the office of executor of the creditor, the note was discharged; so that an indorsement, even by the debtor himself, could not set it up and make it a binding instrument; and we are of that opinion. The expression used in the cases of *Wankford v. Wankford* and *Cheetham v. Ward* is that the debt is discharged. It is considered to have been paid by the executor to himself, and becomes assets in his hands. Upon this supposition, the rule in equity depends which makes the executor accountable for the amount of his debt as assets. Upon the ground that the debt is gone, our judgment in this case must be for the defendant. *Judgment for the defendant.*¹

BARTRUM, PUBLIC REGISTERED OFFICER OF THE NATIONAL PROVINCIAL BANK OF ENGLAND, v. CADDY.

IN THE QUEEN'S BENCH, NOVEMBER 29, 1838.

[*Reported in 8 Law Journal Reports, Queen's Bench, 31.2*]

ASSUMPSIT by the public registered officer of the National Provincial Bank of England on a joint and several promissory note, dated the 26th of June, 1833, for £200, payable on demand, made by John Hatherley & John Hamlyn, payable to the defendant, or order, and indorsed by the defendant to the co-partnership. Averment of non-payment on demand.

Sixth plea:² that at the time of the making of the note Hatherley & Hamlyn were jointly indebted to one R. Bartlett, in the sum of £200, who then requested the said J. H. & J. H. to furnish him with some security for the said debt, and thereupon the said J. H. & J. H. requested the defendant to indorse a promissory note, to be drawn by them for their accommodation, in order that they might deposit the same with the said R. B. by way of security, for the debt so due and owing by them to him, and the defendant consented to do so; that the note was made, and the defendant indorsed it in blank, and delivered it to the said J. H. & J. H. for that purpose, and to and for no

¹ Conf. *Lowe v. Peskett*, 16 C. B. 500.

A legacy to the payee of a negotiable instrument is not an extinguishment of the instrument. *Carr v. Eastbrooke*, 3 Ves. Jr. 561. — ED.

² 9 A. & E. 275, s. c. — ED.

³ Only so much of the case is given as relates to this plea. — ED.

other intent or purpose whatever, which note was delivered by them to the said R. B. by way of security for the debt so due to him, who received it as a security as aforesaid; that the said J. H. & J. H. paid to the said R. B., on the 1st of July, 1833, the said debt so due to him from them, and the said R. B. then redelivered the said promissory note to the said J. H. & J. H.; that John Hamlyn afterwards, and more than two years from the date, delivered the said note to the said co-partnership, to secure to him a debt then due from the said J. Hamlyn, without any authority from the defendant in that behalf, and the said co-partnership have not been the holders of the said note, except by the delivery of Hamlyn. Verification.

To this plea there was a demurrer and joinder in demurrer.

Crowder, in support of the demurrer, argued that as the plea only showed that the delivery of the note to the plaintiff was a fraudulent act by Hamlyn, but did not allege that the bank was a party to that fraud, it was no answer to the action. He cited *Peacock v. Rhodes*, *Collins v. Martin*, *Hodges v. Steward*, *Ex parte Pease*,¹ *Solomons v. The Bank of England*,² as showing that an innocent holder for value is entitled to recover, notwithstanding any fraud or felony by former parties. *Adams v. Bingley*³ and *Foster v. Pearson*^{*} show that an antecedent debt will be a good consideration for the indorsement, and constitute the indorsee a holder for value.

Erle, contra. The defence really rests upon the fact that this note had been satisfied and discharged when it was indorsed over to the plaintiff, and therefore could not be reissued. The plea shows that it was given by the defendant to secure the debt of Hatherley & Hamlyn; that that debt was afterwards discharged, and the note was delivered up by the holder to them. It was no longer capable of being negotiated. *Freakley v. Fox*, *Brown v. Davies*, *Beck v. Robley*, *Thorogood v. Clarke*.⁵ In *Gomez Serra v. Berkley*, *Callow v. Lawrence*, and *Burbridge v. Manners*, the bills and note had not been discharged by the person originally liable. Then the 55 Geo. III. c. 184, § 19, enacts, "That all promissory notes, &c., not thereby allowed to be re-issued, shall, upon any payment thereof, be deemed and taken to be thereupon wholly discharged, vacated, and satisfied, and shall be no longer negotiable or available in any way whatsoever, but shall be forthwith cancelled by the person paying the same." Secondly, this note must be taken to have been overdue; and the holder took it subject to all the equities to which it was liable in the hands of the indorser. *Banks v. Colwell*.⁶ It is true, it is a note payable on demand, and no case determines when such a note is overdue. In *Barough v. White*,⁷

¹ 1 Rose, 232.

² 13 East, 135, n.

³ 1 M. & W. 192.

⁴ 1 Cr. M. & R. 849. ⁵ 2 Stark. 221. ⁶ Bayley, Bills, 454. ⁷ 4 B. & C. 325.

the court seemed to intimate that there must be some evidence of a presentment. That may be inferred in the present case. Thirdly, the indorsement is without consideration, because the note was not the security for any money advanced; but it was given to secure a past debt, and the plaintiff is not a holder for value within the meaning of the rule. *De la Chaumette v. The Bank of England*,¹ *Welstead v. Levy*.² In *Pearson v. Foster*, there were as well present as past advances; and in *Adams v. Bingley* the action was brought against the representative of the maker of the note: here it is against the indorser only.

Crowder, in reply. The plea does not disclose facts which show that the note has been paid: if it had been, why did not the defendant plead that the note had been paid? It is not alleged that the note has been reissued. It was given as a security for a debt; and therefore, though payments may have been made, they may not have applied to this note. In the case of notes deposited with a banker, it would be so. Where a bill is overdue, or is payable at a particular time, it cannot be reissued; but here it is payable on demand. *Roberts v. Eden*³ is an authority to show that such a note might continue in circulation.

LORD DENMAN, C. J. (after stating the pleas), said. It appears perfectly plain that the sum, to secure which this note was given, has been paid, and the note itself redelivered. That is the proper mode of averring a satisfaction. Then, if the note has been actually paid, the statute applies. In *Freakley v. Fox*, though it is not a direct authority, it was assumed that, if the note were discharged, it could not be reissued. The plaintiff, therefore, cannot recover.

PATTESON, J. The argument which is offered to show that this is not the statement of a payment of the note is not applicable on these pleadings. If it had been given as a security for a floating balance on a running account, that might have been replied. But it appears that the note was made to secure a specific debt, which *Hatherley & Hamlyn* owed, and on which note they were primarily liable. Then it is averred that they paid that debt, and that the note was redelivered to them. It is then immaterial whether *Hamlyn* passed it away, because money was due to him. The note had come into the hands of persons who could not by law reissue it. We must understand from the plea that the note was reissued, which, according to the statute, cannot be done. In *Freakley v. Fox*, it seems to have been assumed that the law was so. There Lord Tenterden says, "On behalf of the defendant, it was contended that by the appointment of the maker to the office of executor to the creditor the note was discharged." What is the

¹ 9 B. & C. 203.

² 1 M. & Rob. 138.

³ 1 B. & P. 398.

meaning of that passage? Why, that it was impossible to make the instrument binding. It is true that the plaintiff was claiming through the executor; and, if he could not indorse it in that character, it was not material whether he would be liable on any other grounds. Still, if the doctrine now urged be correct, the payee might have reissued the note, and then the party would have been liable; whereas, the court say that the debt is discharged. They must therefore have considered that it could not be reissued. The other cases of *Beck v. Robley* and *Thorogood v. Clarke* are more directly in point. *Roberts v. Eden* is not applicable. The note there never came back to the hands of Eden. The accounts were settled, it is true; but at that time the note was outstanding in the hands of the indorsee, and, though it might perhaps have been contended that the payment by the indorsee was a payment for the use of the maker, it was not, in point of fact, so contended. Here the note came into the hands of the persons ultimately liable upon it.

WILLIAMS, J. The whole argument is that there is no express allegation that the note was paid. This is on general demurrer; and, if there be a substantial allegation of payment and satisfaction of the note, it will do. The plea states that the note was given to secure a particular debt of £200, and afterwards that that sum was paid, and the note delivered up to the makers. I think that that is a substantial averment that the note was satisfied. If so, the statute puts an end to all argument.

COLERIDGE, J. Does the plea show that the note has been paid? Such payment is a matter of fact which might have been traversed, and it seems to me that there is a distinct allegation of its having been paid. There was an antecedent debt, and a security given for it in the note indorsed for that specific debt. The facts subsequently stated would warrant any jury in saying that the note had been paid. The case ingeniously put, of a note given by way of security for a floating balance, is answered by saying that it is not this case, and that, in each case, there is a question of fact for a jury. Under such circumstances, a jury might say that the note was not paid. It was urged that the bank had no notice of the payment: to that I answer that the statute does not require any. *Judgment for the defendant.*¹

¹ *Thorogood v. Clarke*, 2 Stark. 251, *accord*.

Conf. Thomas v. Fenton, 5 Dow. & L. 28. — **Ed.**

LAZARUS v. COWIE.

IN THE QUEEN'S BENCH, JUNE 20, 1842.

[Reported in 3 *Queen's Bench Reports*, 459.]

ASSUMPSIT on a bill of exchange drawn by George Arnold upon, and accepted by, defendant, and indorsed by Arnold to plaintiff.

Fifth plea : that defendant for the accommodation and at the request of Arnold accepted the bill, and that there never was any consideration or value whatever for defendant's accepting the same, or paying the amount thereof or any part of such amount ; that the bill was and is an instrument or bill liable to the charges and duty imposed by the statute in such case made and provided ;¹ that the bill, after defendant had accepted the same, and before the same was indorsed to plaintiff, to wit, on, &c., was by Arnold indorsed and negotiated for his own use and benefit ; that Arnold, when the bill became due and payable, and before the same was indorsed to plaintiff, to wit, on, &c., fully paid and satisfied the bill, and that the bill was thereupon then given up and delivered to Arnold fully paid, satisfied, and discharged ; and that the bill, after the same had been so paid, &c., and given up and redelivered as aforesaid, and also after the same was due and payable, to wit, on, &c., was, without ever having been in any manner restamped, and without the payment, for or in respect of the reissuing of the bill, of any money or duty whatsoever, indorsed by Arnold to plaintiff, and was thereupon delivered by Arnold to plaintiff, contrary to the form of the statute, &c.:² of all which said several premises the plaintiff, before and at the time when the bill was indorsed to him, had notice. Verification.

Special demurrer, stating, among many other causes, that the plea is double and multifarious, &c.³

Joinder in demurrer.

The case was now argued.⁴

J. W. Smith, in support of the demurrer.

Flood, contra. The plea is not bad for duplicity. The facts alleged constitute, and are intended to constitute, only one defence. It is said that the plea raises three answers ; but it is the defect of stamp only which makes the other facts amount to an answer. Payment by the drawer at maturity is no defence for the acceptor against a *bona fide* holder for value ; negotiation of an overdue bill is merely

¹ 55 G. 4, c. 184.

² § 19.

³ Only so much of the case is given as relates to this ground of demurrer. — ED.

⁴ Before Lord Denman, C. J., Patteson, Williams, and Wightman, JJ.

so far a ground of suspicion that the holder is called upon to show that he did give value for it; a drawer for value may, until payment by the acceptor, reissue the bill so as to give a right of action both against himself and against the acceptor; and even on an accommodation bill the necessity for a new stamp supplies the only answer; for the acceptor gives the drawer authority to do any thing which is necessary for raising money on the bill, *inter alia* to reissue it; but, as the drawer is himself the party ultimately liable, payment by him puts an end to the bill, and a fresh stamp becomes necessary, as much as it would after payment by the acceptor. For the same reasons, the circumstance that the indorsee had notice of the premises would not of itself be a sufficient answer.

J. W. Smith, in reply. There are three distinct defences. 1. Payment by the party ultimately liable, after which he reissued the bill to plaintiff, an indorsee, with notice: this alone would be a sufficient answer; and, as the reissuing appears to have been after the bill was due, the allegation of notice was unnecessary. 2. Indorsement to the plaintiff after the bill was due, with notice of its being an accommodation bill, is another complete defence. 3. The Stamp Act. Even if they do not constitute good independent defences, they fall within the observation of Parke, B., in *Regil v. Green*:¹ "This is not precisely duplicity, but the plaintiff has no right to include several matters in his replication, so as to embarrass the trial." *Cur. adv. vult.*

LORD DENMAN, C. J., in this vacation (June 25th) delivered the judgment of the court.

In the case of *Charles v. Marsden*, it was held to be no defence that a bill was an accommodation bill, and indorsed to the plaintiff after it became due, unless it had been shown also that it was agreed not to be indorsed after due. According to that case, the indorsee, after it is due, stands in the shoes of the indorser in other cases, but not in that of accommodation bills. Again, if a bill is paid by the drawer before due, yet he may reissue it before due, *Burbidge v. Manners*; or, if he pay it when due, he may also reissue it. *Callow v. Lawrence*. This plea therefore contains no defence without the averment of want of stamp: all the other averments do not make a defence;² neither should it appear that they were intended so to do, but are introduc-

¹ 1 M. & W. 328.

² But see *Reynolds v. Blackburn*, 7 A. & E. 161; *Sard v. Rhodes*, 1 M. & W. 153; *Purssford v. Peek*, 9 M. & W. 196; *Lane v. Ridley*, 10 Q. B. 479; *Parr v. Jewell*, 13 C. B. 909; 16 C. B. 684, s. c. (*semble*); *Pyper v. McKay*, 16 Up. Can. C. P. 67; *Roche v. Kempt*, 33 Up. Can. Q. B. 387; *Love v. Brown*, 38 Pa. 307, where it was held that payment by the drawer at maturity was a bar to an action against the accommodation acceptor. — Ed.

tory only, and necessary under the circumstances to raise the defence of want of stamp. The averment of notice to the plaintiff at the end is indeed unnecessary; but it is equally so if the other part of the plea be supposed to be a defence. The plea therefore is not multifarious, but is one defence, viz. want of a stamp; and if, under the other circumstances stated in the plea, the bill required a fresh stamp, the plea is good. Now it cannot be denied that, if a bill be paid when due by the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person could sue on it: no person remains liable on it. If put into circulation again, it becomes a new bill payable at sight, and must have a fresh stamp. Stat. 55 Geo. III. c. 184, § 19; *Holroyd v. Whitehead*.¹ If a bill therefore be paid when due by the acceptor, it clearly cannot be reissued without a fresh stamp: if so paid by the drawer, being also payee, it might, in ordinary cases, be reissued without a fresh stamp. *Callow v. Lawrence*. But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value: he is the person ultimately liable; and his payment discharges the bill altogether.

We think, upon the whole, that our judgment must be for the defendant.

Judgment for defendant.



HARMER AND OTHERS *v.* STEELE.

IN THE EXCHEQUER CHAMBER, MAY 29, 1849.

[*Reported in 4 Exchequer Reports, 1.*]

ASSUMPSIT by the defendant in error (the plaintiff below) against the plaintiffs in error (the defendants below) on a bill of exchange, dated the 3d of December, 1839, drawn by William Wood upon and accepted by the defendants below, for payment to the order of the said W. Wood, six months after date, of the sum of £400, value received, in final settlement of accounts to that date, and indorsed by W. Wood to the plaintiff below.

The defendant below, Harmer, let judgment go by default: the other defendants, Benham and Laxton, pleaded (*inter alia*) as follows:—

Tenth plea: that, after the making and accepting of the said bill, and before the same became due, to wit, on the day and year in the declaration mentioned as the day and year when the said bill was accepted, the same was delivered, so accepted by the defendants, to

¹ 1 Marsh. 128.

the said W. Wood; and the defendants say that, after the said bill was so accepted and so delivered as aforesaid, and while the said W. Wood was the holder and payee thereof, to wit, on the day and year last aforesaid, the said W. Wood indorsed the said bill to the said defendant, James Harmer, and then delivered the said bill so indorsed to the said J. Harmer, with the intention of divesting himself, the said W. Wood, and whereby the said W. Wood did divest himself, the said W. Wood, of all right, title, and interest of, in, and to the said bill, and of the right of suing thereon when the same should become due, and of indorsing the same again. And the defendants further say that, when the said bill was so indorsed to the said J. Harmer, it was indorsed for a good and valuable consideration, then therefor paid by the said J. Harmer to the said W. Wood in that behalf, to wit, the sum of £380. And the defendants say that the said J. Harmer continued to be and was the holder and possessor of, and the person entitled to the said bill, always from the time of the indorsement thereof by the said W. Wood until the said bill was afterwards, to wit, on the first day of January, 1845, delivered by the said J. Harmer to the plaintiff. And the defendants say that the indorsement in the declaration mentioned consists merely of the said last-mentioned delivery by the said J. Harmer to the plaintiff of the said bill so indorsed by the said W. Wood, and that the said bill was never indorsed by the said W. Wood, otherwise than as in this plea mentioned; and that, before and at the time when the said bill was so delivered to the plaintiff by the said J. Harmer, the plaintiff had notice and knowledge of all the facts, matters, and things in this plea mentioned. Verification.

The twelfth¹ plea was also similar to the tenth, except that it alleged that the bill was delivered so indorsed by Harmer to the plaintiff after it had become due and payable, to wit, &c.

The plaintiff demurred specially to all the above pleas.

Joinders in demurrer.

On the argument of these demurrers, the Court of Exchequer gave judgment for the plaintiff below.² Upon this judgment, a writ of error was brought into this court; and the case was argued, on the 27th of November, 1846,³ by

Phipson, for the plaintiff in error. At all events, the twelfth plea is a good answer to the action. It shows that Wood, the drawer and payee of the bill, indorsed it in blank and delivered it for value to

¹ Only so much of the case is given as relates to the substantial validity of this plea. — Ed.

² 14 M. & W. 831.

³ Before Wilde, C. J., Patteson, Coleridge, Coltman, Maule, Wightman, and Williams, JJ.

Harmer, one of the acceptors, who kept it until it was due, and afterwards delivered it so indorsed to the plaintiff. The real defence, under this plea, is the same as that in the case of *Freakley v. Fox*; namely, that where the acceptor of a bill, or maker of a note, pays it, and keeps it until it is due, that is an absolute satisfaction of the instrument. [He cited also *Williams on Executors*, p. 1126, 4th ed.; *Wankford v. Wankford*,¹ *Bartrum v. Caddy*, *Beck v. Robley*, *Callow v. Lawrence*, and *Morley v. Culverwell*.]

Martin, contra. The twelfth plea is bad, as well in substance as in form. With respect to the case of *Freakley v. Fox*, on which it is said to be founded, that case was merely an instance of the old rule of law, that the creating of a man's debtor his executor is an extinguishment of the debt. *Morley v. Culverwell* is rather an authority for the plaintiff. There it was held that where the drawer of a bill before it became due agreed with the acceptor that, on his giving a mortgage security for the amount, he, the drawer, should deliver up the bill to him as discharged and fully satisfied, and the acceptor accordingly executed the mortgage and received back the bill, the drawer was liable on the bill to a party to whom the acceptor afterwards, before it became due, indorsed it for value. Parke, B., says in that case: "The question is whether the fact of the acceptor having satisfied the bill before it became due is any defence against a *bona fide* indorsee. I am of opinion that nothing will discharge the acceptor or the drawer except payment according to the law-merchant; that is, payment of a bill at maturity." The cases on which the judgment in *Freakley v. Fox* was founded are collected in *Williams on Executors*, p. 1126, 4th ed.; but they are not applicable here. There is no reason why a man should be deprived of his right to be paid the debt due upon a bill of exchange, because on the day when it became due he happened to be the owner of it. There is no legal extinguishment of the debt. The only difficulty is the technical one which arises from the circumstance of the same party being plaintiff and defendant. As soon as that is removed by the indorsement of the bill to another person, no objection remains.²

Phipson, in reply.

Cur. adv. vult.

The judgment of the court was now delivered by

WILDE, C. J. [His Lordship stated the pleadings, and proceeded]: The twelfth plea, on which the defendants more particularly relied, requires a separate consideration. That plea in effect states, like the tenth and eleventh, that, while Wood was the holder and payee of the bill, and before it became due he indorsed and delivered it to Harmer, one of the acceptors and of the defendants below, for a valuable con-

¹ 1 Salk. 299.

² Per Parke, B., 14 M. & W. 839.

sideration, who became and continued the holder of it till he delivered it to the plaintiff; and that the indorsement to the plaintiff, mentioned in the declaration, consisted merely of delivery by Harmer to the plaintiff of the bill so indorsed by Wood. After this statement, which the twelfth plea contains in common with the tenth and eleventh, the twelfth plea adds that the bill was delivered by Harmer to the plaintiff after it became due. The Court of Exchequer gave no decision as to the validity of this plea in substance, though they appear to have had considerable doubt whether it would not have been, if good in form, a sufficient answer to the declaration. The substantial answer which it was contended the plea gives to the declaration is that the bill, at the time it became due, was in the hands and the property of one of the three acceptors, who were liable to pay; and that the present liability to pay, and present right to receive, the amount of the bill, concurring in the same person, operated as a payment and performance of the contract of acceptance, on which, consequently, no action could afterwards be maintained. And we are of opinion that this is a good ground of defence in substance. There is no doubt that, when a bill has been paid at maturity by a sole acceptor to a third person, who is the holder, no action can afterwards be brought upon the acceptance; and it is equally certain that if one of several joint acceptors pays the bill at maturity to such third person, being the holder, the contract of acceptance is performed, and no action can be maintained upon it. It is true that, in this latter case, it may be that the acceptor who has paid the bill may have a right of action against the other joint acceptors for contribution, if the state of accounts between them, or the terms on which they agreed with one another to become joint acceptors, should afford ground for such an action; but that action would not be on the contract of acceptance or on the bill, but on a different contract, arising out of the state of accounts between the joint acceptors, or the terms on which they agreed together to accept; and the right to bring it would not be capable of being transferred by act of the parties, by indorsement of the bill, or otherwise. If, therefore, the defendant, Harmer, instead of becoming the holder by giving value for it before it was due, and retaining it till it was due, had acquired it by paying the amount to a third person, being the holder, when the bill arrived at maturity, there seems to be no doubt that all right of action on the acceptance would have been extinguished. And it appears to us, on the authority of the case of *Freakley v. Fox*, and on principle, that the fact of the defendant, Harmer, one of the acceptors, being at the time the bill became due the holder, and entitled to receive as well as liable to pay the amount of the bill, operated in respect of all the defendants as a performance of

the contract to pay the bill at maturity, and put an end to the contract of acceptance. A case was put in argument. Suppose there were three acceptors, one for the accommodation of the other two: he purchases the bill during its currency, and retains it after it is due; may he not indorse it, and give a right of action to his indorsee? We think the answer is that he cannot give such right of action; that he may sue the other joint makers for what may be due to him in respect of his having accepted for their accommodation, and protected them from the payment of the bill, but that he cannot transfer this or any other right against the joint acceptors by indorsing the bill.

For these reasons, we think the twelfth plea is a sufficient answer in substance¹ to the count on the bill.

*Judgment reversed accordingly.*²

JONES AND ANOTHER *v.* BROADHURST.

IN THE COMMON PLEAS, JANUARY 31, 1850.

[*Reported in 9 Common Bench Reports, 173.*]

CRESSWELL, J., now delivered the judgment of the court.³

The declaration in this case charges the defendant as the acceptor of a bill of exchange for £49, drawn by W. & C. Cook, payable to their order, at three months after date, and indorsed by the drawers to the plaintiffs; and, among other pleas, not material to be noticed on the present occasion, the defendant, by his fourth plea, alleged that, after the indorsement of the bill of exchange to the plaintiffs, and before the commencement of the action, the drawers of the bill had delivered to the plaintiffs, and the plaintiffs had accepted divers goods, of the value of £50, in full satisfaction and discharge of the said bill of exchange, and all damages and causes of action in respect thereof; and that the plaintiffs, from the time of the said satisfaction of the said bill of exchange to the time of the pleading of the plea, had always held the same against the will and consent of the said drawers, and so still held the same; and that the plaintiffs commenced this action, and still pro-

¹ The court also held the plea good in form. — *Ed.*

² *Gordon v. Wansey*, 21 Cal. 77; *Cox v. Hodge*, 7 Blackf. 146; *Walton v. Young*, 26 La. An. 164; *Savage v. Merle*, 5 Pick. 83, 85; *Edwards v. Campbell*, 23 Barb. 423, *accord.*

See *Smith v. Awbrey*, 19 Ala. 63; *Stewart v. Hidden*, 13 Minn. 43; *Glenn v. Sims*, 1 Rich. 34. — *Ed.*

³ All that is material to an understanding of the case being contained in this judgment, the rest of the case has been omitted. — *Ed.*

secuted the same against, and in opposition to, the will and consent of the said drawers.

To this plea, the plaintiffs replied *de injuria*; and a verdict was found for the defendant, upon the trial of the issue joined on that plea.

A rule has since been obtained by the plaintiffs, calling upon the defendant to show cause why judgment should not be entered for them *non obstante veredicto*, in respect of the insufficiency of that plea.

Upon this record, the bill of exchange must be taken to have been accepted upon a good consideration. The interest of the acceptor, therefore, is not liable to be affected by the state of accounts or equities between any other parties connected with the bill; and the only question in which he has any interest is whether the party seeking to enforce payment by him is the legal owner of the bill, and whether recovery by and payment to such party will enure as a satisfaction and absolute discharge of his liability upon the bill. By the indorsement averred in this declaration, and not traversed, the plaintiffs became the legal owners of the bill; and the recovery of the amount thereof will have the effect of discharging the defendant from all future liability. The plea does not allege whether such satisfaction was given and accepted before or after the bill became due; nor is it averred to have been at the request, or for or on behalf of the defendant, or in satisfaction of his liability upon the bill, or of the cause of action of the plaintiffs against him; nor does it in any way connect the defendant with the transaction, or show any privity between him and the parties to the satisfaction given, except so far as such parties were the drawers of the bill, and the defendant was the acceptor.

As the plea did not allege that the satisfaction was made at the request, or for or on behalf of the defendant, or in respect of the cause of action stated in the declaration, the defendant was not required to give any evidence to such effect, to entitle him to the verdict he obtained; and, therefore, the verdict will not warrant an intendment of any such facts, or of any other fact tending to extend the import of the plea as stated upon the record; and the question raised by the plea, according to its terms, is whether satisfaction of a bill as between a drawer or indorser, and an indorsee made before or after the bill becomes due, enures as a satisfaction on behalf of the acceptor, and operates to discharge him from liability to the indorsee.

In support of the rule, it was contended that the plea did not show sufficient matter to bar the plaintiffs from judgment, because the satisfaction therein set forth was not, as before stated, averred to have been made at the request, or for or on behalf of the defendant, or for or in respect of the cause of action declared upon; and that no legal privity

was shown between the parties who made satisfaction and the defendant, and therefore the satisfaction made did not enure as a discharge of the defendant; and that the satisfaction was made by parties who were under a personal liability upon the bill declared on, either absolute or contingent; and that the plea imports that the satisfaction made by them referred and was limited to their own personal liability, and was not shown to have extended beyond; and that the satisfaction to the indorsee of a bill, made by the drawer or indorser, did not, as a legal consequence, enure as a satisfaction of the bill *quoad* the acceptor, or any other person, other than those who, if called upon by the indorsee to pay the bill, would have a remedy over against the party who made the satisfaction, and thereby subjecting such party to a liability to make double satisfaction.

It was also insisted that the plea did not show any legal privity between the drawers who made the satisfaction and the defendant; and that the plea, therefore, at most, amounted to a plea of satisfaction made by a stranger, and as such could not be pleaded in bar against the plaintiffs.

On the part of the defendant, it was contended, upon showing cause, that upon principle and authority satisfaction made by the drawer of a bill to an indorsee enured by law as a satisfaction by or on behalf of the acceptor, and might therefore be pleaded in bar to any action afterwards brought by the indorsee against the acceptor; and that the drawer and acceptor's being parties to the same bill was a sufficient legal privity to make satisfaction by the drawer enure as a discharge of the acceptor, as against the indorsee who received the satisfaction; and, further, it was contended that it was competent to any one to plead in bar satisfaction, even by a stranger, for the cause of action sued upon which had been accepted by the plaintiffs.

The case was very elaborately argued, and many authorities were referred to on both sides. The court has examined all the authorities referred to, and considered the case, and in the result is of opinion that the plea, as proved and sustained by the verdict, does not show sufficient matter to bar the plaintiffs, and that the rule to enter judgment for the plaintiffs *non obstante veredicto* must be made absolute.

In considering the case upon principle, it will be proper to advert to the legal relation in which the respective parties stand towards each other, upon the effect of whose acts and rights the determination of the rule must depend. It is to be observed that the drawers and acceptor are parties to the same instrument, as contractors with each other, and not as joint-contractors with a third person; and that, by the indorsement of the bill, independent and different contracts arise

on the respective parts of the drawers and the acceptor, with the indorsees. The acceptor is primarily and absolutely liable to pay the bill, according to its tenor. The drawers are liable only upon the contingencies of the acceptor's or drawee's making default, and of the holder's performing certain conditions precedent, such as presenting the bill according to its tenor, and giving due notice of the failure of the acceptor or drawee to pay, upon a proper presentment.

The contracts created by the bill, as regards the drawers and the acceptor, are therefore essentially distinct; and there seems to be no legal ground why the indorsee of a bill may not accept satisfaction of the contingent or absolute liability of the drawer, without, by so doing, discharging the acceptor.

The competency of an acceptor to pay may be doubtful; and no valid reason is apparent why the indorsee may not release and discharge the drawer or an indorser, by competent legal means, either upon consideration more or less valuable, or without, and retain his remedies against the acceptor, — unless in the case of an accommodation bill, in which case the acceptor is a mere surety as between him and the drawer, and entitled to recover against the drawer whatever he may be compelled to pay in discharge of his suretyship. In such a case, where an indorsee who has received satisfaction from the drawer, with notice, sues the acceptor, a different question may arise; but, upon the record in this case, the bill must be taken to have been a bill accepted for value, and which the acceptor therefore ought, in all events, to pay; and, having received value, it is difficult to discover any valid reason why he should be discharged from his liability to make the payment, which for value he has contracted to make, by reason of any arrangements between others, to which he is no party, in which he is not shown to have interfered, or his rights and liabilities are not shown to have been in the contemplation of the parties to any such arrangements, and by which his interests are not in any respect compromised or affected.

By the indorsement of a bill, the indorsee becomes the legal owner of it; and satisfaction of the contingent or absolute liability of the drawer or of an indorser does not necessarily vacate or avoid the effect of the indorsement, or destroy the title of the indorsee to the ownership of the bill. Payment of the bill by a drawer or an indorser may or may not, according to circumstances, entitle the party paying to the possession of the bill: there may be a satisfaction of the bill between such parties, which may not entitle them to the possession of the bill. The plea in question has no statement to the effect that the drawers, by reason of the satisfaction made, were entitled to have the bill delivered up: it only states that the plaintiffs hold the bill against the will and

consent of the drawers, which is by no means equivalent to a statement that they were entitled to have the bill delivered to them. The plea does not aver that the value of the goods delivered in satisfaction was equal to the amount of the bill; and it is consistent with the language of the plea that the drawers may have made satisfaction of the bill, so far as regarded their liability by any small composition, leaving the plaintiffs with all their remedies in point of law against the acceptor and other parties to the bill; and yet the drawers may afterwards have dissented from the plaintiffs' retaining the bill or suing the acceptor upon it.

The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up or be deemed to be satisfied as between the plaintiffs and the acceptor; and, when the nature of the relation in which the respective parties stand towards each other is considered, no principle is apparent upon which, as a consequence in law, the satisfaction of a bill as between the indorsee and the drawer should operate as a satisfaction and discharge in favor of the acceptor.

Supposing the effect of the plea to be that the plaintiffs are suing as trustees for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his *cestui que trust*. And we are of opinion that the defendant has not established any legal principle which will entitle him to judgment upon this plea.

But it has, on his behalf, been contended that the plea ought to be supported, and judgment given for the defendant upon authority.

We have reviewed the authorities relied upon, and they do not appear to us to entitle the defendant to judgment.

The case of *Bacon v. Searles*, was cited; and it must be admitted that, in that case, according to the report, it was held that the indorsee of a bill, who had received from the drawer a part of the amount of the bill, was entitled to recover from the acceptor only the balance; and Lord Loughborough, then chief justice, is reported to have said "that, if the drawer of a bill anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking;" and he adds: "So that, if the acceptor were to pay the bill after notice given to him that the drawer had already paid it, an action would lie for the drawer against the acceptor, to recover back the money so paid." Lord Loughborough concludes his judgment by saying: "Another reason which weighs much with me is the great mischief which would ensue to merchants, among whom accommodation

bills are circulated to a vast extent, if, after a bill had been taken up by the drawer, the acceptor should be called upon for payment." The report of this case is not satisfactory. Lord Loughborough is made to say that if the drawer anticipates the acceptor, and pays the money himself, he thereby releases the acceptor from his undertaking; and yet he is said to have added, "that, if the acceptor were to pay the bill after notice given to him that the drawer had already paid it, an action would lie for the drawer to recover it back again," which, as applied to the facts of the case, is not very intelligible. If it was meant that, supposing the drawer should sue the acceptor upon the bill, the acceptor could not plead in bar the payment to an indorsee, after notice that the drawer had paid it, it is intelligible, but not, upon the facts stated, very satisfactory. The point in judgment was whether an indorsee, after having received payment of part of the bill from the drawer, was entitled, in an action against the acceptor, to recover the whole amount of the bill, or only the balance of the bill remaining unpaid; and it was held that the balance only was recoverable. As a decision upon that point, it has been overruled. The observations made by the judges render it uncertain whether it was the case of a bill for value or an accommodation bill; but those observations are of doubtful accuracy, in either view of the case. If it was a bill for value, the remark is not correct, that payment by the drawer discharged the acceptor from his promise, because the acceptor in such a case would be clearly liable to the drawer, who, by his payment to the indorsee, would become entitled to sue the acceptor upon the bill; and, if it was the case of an accommodation bill, the remark is unintelligible, that if the acceptor, who would be surety only for the drawer, was to pay the bill after notice, the drawer, who was the principal debtor, might recover the money back again from the acceptor, his surety.

It may be that what was intended to be said was that such a payment by the acceptor would make the indorsee a trustee for the drawer, and liable to refund to him what should be paid by the acceptor; but it is by no means clear that this was intended to be said, because the remarks refer to the acceptor's liability to refund in terms, and speak of a payment by the acceptor, after notice of payment by the drawer,—which would be quite immaterial upon the question whether the indorsee would become a trustee for the drawer, in regard to the sum received from the acceptor. The doubt whether it was the case of a bill for value, or an accommodation bill, is increased by the observations of Mr. Justice Wilson, who referred to a case of *Beck v. Robley*.

Considering this case of *Bacon v. Searles* with reference to the point

decided,—that part of a bill (accepted for value) being paid by a drawer or indorser disentitles the indorsee to recover from the acceptor more than the balance remaining unpaid,—it has been overruled by modern decisions, and is not now to be deemed to be law; and, if it is to be considered as the case of an accommodation bill, it is inapplicable to the questions which arise upon this plea.

Mr. Justice Wilson referred to the case of *Beck v. Robley*, reported in a note to *Bacon v. Searles*, and which it would seem from the statements in the report was the case of an accommodation bill. The facts were these: Brown drew the bill upon Robley, payable to Hodson, and gave the bill to Hodson as security for an advance made to him by Hodson. Robley accepted the bill, and Brown the drawer took it up when due, in Hodson's hands, and received back the bill with Hodson's indorsement upon it. Brown, after the bill had become due, paid it to Beck, who brought the action against Robley. The action was held not to be maintainable, and correctly so: as, after the bill had become due, the drawer could only negotiate it subject to such equities as existed against him; and, it being an accommodation bill, Brown the drawer could not have sued the acceptor, and so neither could a subsequent holder claiming under him after the bill had become due. The decision against the plaintiff, therefore, would have been correct, irrespectively of another fact relied upon in that case, viz. that Beck, the plaintiff, was compelled to claim through the indorsement of Hodson, the payee; and the court was confirmed in its decision against the plaintiff, upon the ground that, if effect were given to Hodson's indorsement under the circumstances, Hodson himself might be rendered liable,—a result which ought not to occur. It is unnecessary to consider the correctness of that opinion; but both the cases of *Bacon v. Searles* and *Beck v. Robley* would be well decided, if the bills upon which those actions were brought were accommodation bills; and *Beck v. Robley*, in that event, might be considered as an authority for the determination of *Bacon v. Searles*.

Upon *Bacon v. Searles* being cited as an authority in *Pursord v. Peek*,¹ as deciding that a payment by the drawer of a bill discharged the acceptor *pro tanto*, LORD ABINGER, C. B., said that, "if that were the principle of that case, it might be a question whether, if it were now considered, it would not be overruled."

The case of *Johnson v. Kennion* was cited as an authority on the part of the plaintiffs that the contract created by the bill could not be severed and made the ground of two actions, and that the holder must bring an action for the whole, and be considered trustee for the drawer for so much as he had paid. Mr. Justice Wilson is said to have re-

ferred to the case of *Beck v. Robley* as contrary to that position ; but it is not obvious that such is the effect of *Beck v. Robley*. *Johnson v. Kennion*, however, distinctly decided that the indorsee was entitled to recover the whole amount of the bill, although he had received a part from the drawer ; and, unless *Bacon v. Searles* and *Beck v. Robley* were distinguishable, upon the ground of the actions being upon accommodation bills, it does not appear how the authority of *Johnson v. Kennion* was avoided.

Assuming, however, *Bacon v. Searles* and *Beck v. Robley* to be authorities that the acceptor of a bill for value is discharged altogether, or *pro tanto*, by payments made by a drawer or indorser to an indorsee, who afterwards sues the acceptor, they cannot be considered as binding authorities ; and they are inconsistent with *Callow v. Lawrence*, where the continued liability of the acceptor is distinctly determined ; and *Hubbard v. Jackson*¹ is a decision to the same effect, following the authority of *Callow v. Lawrence* ; and, in both cases, *Beck v. Robley* was treated as a decision upon the ground that the plaintiff could not claim through Hodson's indorsement.² . . .

Reference has thus been made to the several cases which were cited, with some regret, as the only result is to show that they are inapplicable to this case, and afford no assistance to the court in determining the question raised upon the record ; and, in fact, no determination has been brought to the notice of the court, showing this plea to be good, although there are some expressions in some of the older cases which have that aspect, but which *dicta* were not necessary to the decision of the cases in which they are to be found ; and such *dicta* are not consistent with subsequent determinations. It certainly has been no rare practice for indorsees of bills of exchange and promissory notes to take verdicts for the full amount of the instruments, after having received partial payments from other parties to such instruments ; and there are reported authorities in distinct affirmation of the right so exercised by the plaintiffs, — *Callow v. Lawrence*, before mentioned, *Reid v. Furnival*,³ and numerous cases in bankruptcy, where proof is admitted against the acceptors of bills and makers of notes for the full amount, notwithstanding partial payments made by other parties. In *Ex parte De Tastet*, *In re Corson*,⁴ Warren and Bruce were held

¹ 1 M. & P. 11 ; s. c. 4 Bing. 390 ; 3 Carr. & P. 134.

² The learned judge here stated the facts in *Pierson v. Dunlop*, 2 Cowp. 571 ; *Walwyn v. St. Quintin*, 1 B. & P. 652 ; *Purssord v. Peek*, 9 M. & W. 196 ; *Reynolds v. Blackburn*, 7 A. & E. 161 ; *Sard v. Rhodes*, 1 M. & W. 153 ; *Field v. Carr*, 5 Bing. 18 ; *Thomas v. Fenton*, 5 D. & L. 28 ; *Hemming v. Brook*, Car. & M. 57 ; *Pownal v. Ferrand*, 6 B. & C. 439 ; *Lane v. Ridley*, 10 Q. B. 479, showing that these cases were irrelevant to the question before the court. — Ed.

³ 1 C. & M. 538.

⁴ 1 Rose, 10.

entitled to prove against the estate of the bankrupts, who were the acceptors for £1,364, and take dividends for that amount, notwithstanding they had received payments from other parties, reducing their demand to £420.

We think, therefore, that this plea is contrary to principle, and that it has no authority to support it.¹ *Judgment for the plaintiffs.*²

WILLIAMS AND OTHERS v. JAMES.

IN THE QUEEN'S BENCH, JUNE 3, 1850.

[Reported in 19 *Law Journal Reports*, *Queen's Bench*, 445.]

ASSUMPSIT by the plaintiffs as indorsees of a bill of exchange, drawn on the 5th of April, 1848, by T. G. Phillpotts and J. Phillpotts, for £26 1s. 4d., payable to the order of the said T. G. Phillpotts and J. Phillpotts, one month after date, and accepted by the defendant, and indorsed by the said T. G. Phillpotts and J. Phillpotts to the plaintiffs.

Pleas: that the defendant did not accept; that T. G. Phillpotts and J. Phillpotts did not indorse to the plaintiffs; and, fourthly, that after the accruing of the causes of action, &c., and before the commencement of the suit, to wit, &c., the said T. G. Phillpotts and J. Phillpotts paid to the plaintiffs, and the plaintiffs then accepted and received of the said T. G. Phillpotts and J. Phillpotts a large sum of money, to wit, £30, in full satisfaction and discharge of the said causes of action, &c.

The plaintiffs replied to the fourth plea that the said T. G. Phillpotts and J. Phillpotts did not pay to the plaintiffs, nor did the plaintiffs accept and receive of the said T. G. Phillpotts and J. Phillpotts the said sum of money, *modo et forma*. Issue thereon.

At the trial before Platt, B., at the Monmouth spring assizes, 1849, it appeared that the bill was drawn by Messrs. Phillpotts on and accepted by the defendant for a debt due to them, and that it had been indorsed by Messrs. Phillpotts to the plaintiffs, their bankers.

¹ The remainder of the opinion, in which the learned judge discussed without deciding the general question of satisfaction of a claim by a stranger to the obligation, has been omitted. Upon this question, see *Deacon v. Stodhart*, 2 M. & G. 317; *Belshaw v. Bush*, 11 C. B. 191; *James v. Isaacs*, 22 L. J. C. P. 73; *Kemp v. Balls*, 10 Ex. 607; *Smith v. Eggington*, 10 Ex. 845; *Walter v. James*, L. R. 6 Ex. 124; *Barney v. Clark*, 46 N. H. 514; *Burr v. Smith*, 21 Barb. 262; *Hartshorn v. Brace*, 25 Barb. 126. — ED.

² *Randall v. Moon*, 12 C. B. 261, *accord*.

See *Goodwin v. Cremer*, 18 Q. B. 757. — ED.

For the defendant, it was proved, by Joseph Bothamley, a clerk to Phillpotts & Co., that the bill when due, being in the hands of the plaintiffs, was dishonored. Notice of the dishonor being on the 9th of May given to Phillpotts, they on the same day gave a check for the amount to the plaintiffs, in whose hands the bill was left; and the plaintiffs directed the witness to instruct Messrs. Phillpotts's agent to sue the defendant for the amount of the bill. The plaintiffs also put in a letter, from the defendant to the plaintiffs, dated the 9th of May, 1848, in which he stated that he would pay the draft due to Messrs. Phillpotts "to-morrow morning, if you will be pleased to hold it." On the 25th of May, 1848 (the writ having been issued on the 15th), he wrote to Bothamley as follows: "I am sincerely obliged to you for not incurring more expense in the matter of Williams. Will you ask Mr. Phillpotts to leave it stay till Monday, when, sir, you will be paid."

Upon this evidence, the learned judge thought that the defendant's liability as acceptor had not been discharged by the payment made by Messrs. Phillpotts, and that the plaintiffs were entitled to recover.

A verdict was accordingly returned for £26 17s., with liberty to the defendant to move to enter a verdict on the last issue. A rule *nisi* having been accordingly obtained,

Whateley (*Gray* with him) now showed cause. The bill was not an accommodation bill, and therefore the payment of the amount by Messrs. Phillpotts, the drawers, was no discharge of the acceptor's liability. The subsequent letters of the defendant clearly show that he did not consider the payment as made on his behalf. The drawers might have reissued the bill. *Callow v. Lawrence* and *Hubbard v. Jackson*.¹ It was unnecessary that the form of giving up the bill to Phillpotts, and an indorsement by them to the plaintiffs, should be gone through, as it appears that Phillpotts agreed that the plaintiffs should continue to hold it for the purpose of suing on it for their benefit.

[*PATTESON, J.*, referred to *Bacon v. Searles*.]

That case was overruled by *Walwyn v. St. Quintin*,² and is inconsistent with *Johnson v. Kennion*, *Reid v. Furnival*,³ and *Purssord v. Peek*.⁴ Moreover, in *Bacon v. Searles* there was nothing to show that the plaintiff was suing as a trustee for the drawer. (He was then stopped by the court, who called upon)

Shee, Serjt., and *Bovill*, in support of the rule. The sole question is whether the plea is proved.

[*COLERIDGE, J.* How can the bill be finally discharged as against the acceptor, except by payment by him?]

¹ 4 Bing. 390.

^{*} 1 Cr. & M. 538.

² 1 Bos. & P. 652.

⁴ 9 Mee. & W. 196.

[LORD CAMPBELL, C. J. All the circumstances here seem to show an intention to keep the bill alive for the benefit of the drawers.]

No doubt, the plaintiffs might have replied that the drawers had re-issued the bill, and so shown a new promise; but they have not done so, and therefore they have no title to sue. The drawers might have themselves sued upon it without reissuing it, or have recovered the amount from the acceptor as money paid to his use. The drawers made the payment in discharge of their liability as sureties for the acceptor, and that payment will discharge their principal.

[COLERIDGE, J. Hemming v. Brook¹ seems much in point.]

That was a case of part payment only, where the holder clearly has a right of action for the residue; and, besides the indorsee, there was not a surety for the acceptor.

[ERLE, J. The substantial point is that the acceptor has not paid: it is quite immaterial what has taken place between the drawer and the holder.]

The payment discharged the original liability of the defendant, which could only be restored by an actual reindorsement by the drawers to the plaintiffs. Beck v. Robley.

LORD CAMPBELL, C. J. *Prima facie* payment by the drawer to the holder of a bill of exchange will discharge the acceptor from being sued by the holder; but it is quite clear that the drawer may still reserve a remedy in his own hands against the acceptor, and may take the bill and sue upon it himself. Or he may, if he pleases, indorse the bill to another for the purpose of having it sued upon for his benefit; and there is no reason why he may not employ the holder whom he has paid for that purpose. There was here abundant evidence that the understanding was that the bill should not be extinguished, but that the remedy of Messrs. Phillpotts should be reserved: therefore, the defendant was precluded from saying that his liability was extinguished, and the direction of the learned judge was quite right.

PATTESON, J. I quite agree with what my lord has stated; but I think it should be qualified by adding that the drawers were the payees in this case, as that may make some difference, for otherwise they could not have reindorsed the bill.

COLERIDGE, J., and ERLE, J., concurred.

*Rule discharged.*²

¹ Car. & M. 57.

² Davis v. McConnell, 3 McL. 391; Mechanics' Bank v. Hazard, 13 Johns. 353, accord. — ED.

MILNES v. DAWSON.

IN THE EXCHEQUER, DECEMBER 5, 1850.

[Reported in 5 Exchequer Reports, 948]

ASSUMPSIT on a bill of exchange for £45 19s., payable three months after date, drawn by one James Hanson upon and accepted by the defendant, and indorsed by Hanson to the plaintiff. The fifth plea stated that there never was any value or consideration whatever for the indorsement of the bill by the said J. Hanson to the plaintiff, and that the plaintiff took and received and hath always held the same without any value or consideration for the same; and that after the bill became due and payable according to the tenor thereof, and before the commencement of the suit, the said J. Hanson, with the assent and concurrence of the defendant, took and appropriated certain scrip certificates and certificates of shares, of and belonging to the defendant, in divers railway companies and of great value, to wit, of a value far exceeding the amount of the said bill and of all interest thereon, and of all damages by reason of the non-payment thereof, and which certificates had been before then deposited with him the said J. Hanson as a security for the payment of the money secured and made payable by the said bill, in full satisfaction and discharge of the said bill, interest, and damages. Verification. Replication, that the said bill was indorsed by the said J. Hanson to the plaintiff, as in the declaration mentioned, for a good and sufficient consideration, to wit, to the full amount of the said bill; concluding to the country, upon which issue was joined. There was another plea, which raised a similar issue.

At the trial before Parke, B., at the London sittings in last Trinity term, the issues raised by the three first pleas were found in favor of the plaintiff, and the jury were discharged as to the fourth; but the issues raised by the fifth and last plea were found for the defendant.

J. Brown, in Michaelmas term, obtained a rule *nisi* to enter judgment *non obstante veredicto* upon the fifth and last pleas.

Hoggins showed cause. The plea is a good answer to the action after verdict. The plaintiff never having given any value or consideration for the bill, and it being overdue, the executed agreement between Hanson and the defendant precludes the plaintiff from recovering the amount of the bill from the defendant. [PARKE, B. Hanson transfers the bill to the plaintiff, who thereupon becomes the holder, and the right to sue upon it is vested in him. It does not appear that the bill was indorsed after it became due. That being so, what possible

right can Hanson have to receive the amount of the bill?] In point of law, the plaintiff was the mere agent of Hanson to receive the money: a settlement therefore with Hanson is a discharge of the bill. In case, the plaintiff had received the amount of the bill, it would have been his duty to account for it with Hanson, who could have enforced such right against him by an action for money had and received, or perhaps by treating it as a loan. [PARKE, B. Suppose the bill was given to the plaintiff, the only issue is whether the plaintiff gave a good and valuable consideration for it. Suppose the plea had alleged that the bill was handed over to the plaintiff as trustee, would it have been a good plea? ALDERSON, B. The argument in truth proceeds upon the assumption that the bill never was transferred to the plaintiff.] It is submitted that the plaintiff was merely Hanson's agent, and had only a naked authority from him to sue upon the bill with that object.

J. Brown, contra, was not called upon.

PARKE, B. I am of opinion that this rule ought to be absolute. The fifth and last pleas, which are in substance the same, state that Hanson indorsed the bill to the plaintiff without any consideration or value, and that the plaintiff never gave any consideration or value for it; and that after it became due Hanson and the defendant entered into an agreement, by which the former accepted certain scrip in discharge and satisfaction of the bill. It would be altogether inconsistent with the negotiability of these instruments to hold that, after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property in the bill is passed, the right to sue upon the bill follows also. The question whether Hanson could sue the plaintiff, we are not now called upon to determine. If it had been averred that the plaintiff held the bill as his agent, I should not have much difficulty in saying that the action would lie. A bill of exchange is a chattel, and the gift is complete by delivery coupled with the intention to give. If the question as to the rights between donor and donee were now discussed, with reference to the state of the law on the subject as it stood towards the close of the last century, we might hold otherwise than we now do. It has been said that the donee of a bill of exchange cannot sue the donor upon it, as the donor may well allege that the donee did not give any consideration for it. See *Holliday v. Atkinson*,¹ and Mr. Chitty's work on Bills of Exchange, where the cases are to be found collected at page 74. And therefore it may be said that, if this bill was a gift from Hanson, the plaintiff could not have sued him upon it: but still Hanson transferred all his rights to the plaintiff; and how, therefore, can it be contended that a payment to the donor

¹ 5 B. & C. 501.

is to be taken as a satisfaction of a bill in the hands of the donee? The learned counsel contends that it is to be presumed that the indorsement took place after the bill became due and payable. But we are not at liberty to draw any such inference; and it is perfectly consistent with every thing that is stated in this plea that the full title in the bill was transferred to the plaintiff. If the plea had alleged that the plaintiff held the bill as Hanson's agent, merely for the purpose of receiving the money for him, then a payment to either party would have been a good discharge of the party liable upon the bill, and the plea would have been good; but, in truth, the plea does not contain any such averment, and consequently it cannot be sustained.

ALDERSON, B. I am of the same opinion. It is not necessary to say whether Hanson could maintain an action for the recovery of this amount from the plaintiff. But by the indorsement he has transferred to the plaintiff all the rights which, before the indorsement, he had of suing upon the bill. If therefore he has parted with all his rights, and that of suing on the bill, and the plaintiff has them, how is it possible to say that a payment to Hanson, who has not the bill, is a due payment to the plaintiff, who has it?

PLATT, B., and MARTIN, B., concurred.

*Rule absolute.*¹

FOSTER, EXECUTOR OF J. CLARK, v. DAWBER.

IN THE EXCHEQUER, JUNE 28, 30, 1851.

[Reported in 6 Exchequer Reports, 839.]

ASSUMPSIT. The first count of the declaration was on a promissory note, dated the 7th of December, 1845, made by the defendant, for payment of £500 and interest, on demand, to Clark, the plaintiff's testator. The second count was on a similar note for £500, dated the 20th of January, 1846.

Pleas to the first and second counts: secondly, that after the making of the promissory notes, and before any demand of the sums of money therein mentioned, or of either of them, or of any interest thereon, and before any breach of the promises in those counts mentioned, or either of them, the said J. Clark, in his lifetime, to wit, &c., exonerated, absolved, and discharged the defendant from, and then waived, performance of the promises therein mentioned, and payment of the said notes

¹ Field v. Carr, 5 Bing. 13 (*semble*); Woodward v. Elliott, 13 Ind. 516; Emanuel v. White, 34 Miss. 56; Dow v. Rowell, 12 N. H. 49; Manhattan Co. v. Reynolds, 2 Hill, 140; Carr v. Lewis, 20 N. Y. 138; Griffiths v. Gosling, 13 Abb. L. J. 173; Griswold v. Davis, 31 Vt. 390; Davis v. Miller, 14 Grat. 1, *accord* — ED.

respectively, and of the sums of money and interest therein mentioned. Verification.¹ Replication, *de injuria*.

At the trial, Lord Campbell, C. J., told the jury that, in his opinion, there was evidence which would justify them in finding a verdict for the defendant; and they found accordingly.

Montague Chambers obtained a rule *nisi* to enter a verdict for the plaintiff, or for judgment *non obstante veredicto*.

Shee, Serjt., and *Bramwell* showed cause against the rule obtained by the plaintiff. First, there was evidence in support of the second plea. It was clearly the intention of Clark to exonerate and discharge the defendant from the payment of the notes. Now the objection to the evidence will be that the plea states the exoneration to have taken place "before breach;" and, the declaration being founded upon promissory notes payable on demand, a breach in point of law took place upon the delivery of the notes, and consequently the plea was not supported. But the allegation in the plea, when read with the context, is either surplusage or unintelligible, and may be rejected, or it means merely that the exoneration took place before demand made.

Secondly, the plea is good after verdict. It will be contended that a promissory note, payable on demand, is not in the nature of an executory contract, and cannot be waived by parol, that a debt arises upon the delivery of the instrument; and in support of this argument it will be said that the Statute of Limitations runs from the date of the note. It, however, appears from the authorities that the liability of a party upon a bill of exchange may be discharged by waiver alone, without any consideration. This is laid down in *Byles on Bills*, 5th ed., p. 145, as follows: "It is a general rule of law that a simple contract may, before breach, be waived or discharged, without a deed or consideration; but, after breach, there can be no discharge, except by deed or upon sufficient consideration. To this rule it is said that contracts on bills, which are regulated by the custom of merchants, form an exception; and the liability of the acceptor, though complete, may be discharged by an express renunciation of his claim on the part of the holder." In *Dingwall v. Dunster*,² the decision proceeded upon the ground that it did not appear that the holder of the bill expressly discharged the acceptor. Now, the rule which governs bills of exchange equally applies to promissory notes; for those instruments are put upon the same footing as bills of exchange by the 3 & 4 Anne, c. 9. The plea is therefore good after verdict.

Willes, in support of the rule. First, the plea is not supported by the

¹ Only so much of the case is given as relates to this plea. — Ed.

² Dougl. 236.

evidence. The transaction between Clark and the defendant amounted to a gift by the former of the notes to the defendant. An exoneration differs from a gift in being founded upon an arrangement between the parties. *King v. Gillett*.¹ Pailliet, in his *Manuel de Droit Civil*, Code Civil, liv. 3, tit. 3, § 3, throws some light upon this subject. A gift is a matter which rests entirely with the party who possesses the property which he passes by the gift. But this transaction is not good as a gift; for neither was there any promise under seal, nor did the donor give the instrument, which was the subject-matter of the gift, to the defendant. The allegation that the act took place "before breach" is not proved; for a breach exists upon the delivery of the note. [PARKE, B. The allegation, if construed literally, is unintelligible here, where the instrument creates a present duty: it must either be rejected, or it must be considered as meaning, before a demand and refusal, to pay the notes.] Secondly, the plea is bad in substance. The authorities do not fully support the proposition as cited from *Byles on Bills*. In the present case, the defendant was a debtor to Clark; and an action of debt might have been maintained by Clark against the defendant upon those instruments. No case is to be found which decides that a debt due upon a promissory note between the immediate parties can be waived by parol. In former times, an accommodation acceptor was considered merely in the light of a surety. For these reasons, it will be found that the cases referred to in the notes to the passage relied upon in *Byles on Bills* do not support the position there laid down. *Walpole v. Pulteney*,² *Black v. Peele*,² *Rann v. Hughes*,³ *Anderson v. Cleveland*,⁴ *Whatley v. Tricker*,⁵ *De la Torre v. Barclay*,⁶ *Adams v. Gregg*,⁷ *Cartright v. Williams*,⁸ *Farquhar v. Southey*.⁹

PARKE, B. (June 30), said: The court has already disposed of all the points in this case except two. The first of these depends upon the question whether the evidence supported the second plea. [His Lordship, after reading that plea, and stating the substance of the evidence, proceeded:] There is no doubt that the effect of that transaction of the 16th of February, 1846, is to show that the testator meant to discharge the defendant from all liability upon the notes. But it was contended that, as the plea stated the transaction to have taken place before breach, the plea was not proved. The plea is inartificially drawn, and appears to have been copied from the precedents of a plea in discharge of an executory contract. Now, it is competent for both

¹ 7 M. & W. 55.

² Cited in *Dingwall v. Dunster*, Dougl. 236.

⁴ 13 East, 430, n.

⁷ 2 Stark. 531.

⁵ 1 Camp. 35.

⁸ 2 Stark. 340.

³ 7 T. R. 350, n.

⁶ 1 Stark. 7.

⁹ 2 C. & P. 490.

parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts; and we think the words "before breach," when taken with reference to those instruments, are either idle or absurd. If they are to be taken as having any meaning in this plea, they must be read in conjunction with the context; and they merely amount to an allegation that Clark discharged the defendant from all liability before any demand of the sum of money mentioned in the notes. And, if that be so, the plea was proved; for Clark exonerated the defendant before he called on him to pay the amount of the notes. We are, therefore, of opinion that the plea was proved.

The next question is whether the plea is good after verdict. Mr. Willes disputed the existence of any rule of law by which an obligation on a bill of exchange, by the law-merchant, can be discharged by parol; and he questioned the decisions, and contended that the authorities merely went to show that such an obligation might be discharged as to remote but not as between immediate parties. The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule. In the passage referred to in the work of my brother Byles, the words "it is said" are used; but we think the rule there laid down is good law. We do not see any sound distinction between the liability created between immediate and distant parties. Whether they are mediate or immediate parties, the liability turns on the law-merchant, for no person is liable on a bill of exchange except through the law-merchant; and probably the law-merchant being introduced into this country, and differing very much from the simplicity of the common law, at the same time was introduced that rule quoted from Pailliet as prevailing in foreign countries, — viz., that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or by any solemn instrument. Such appears to be the law of France; and probably it was for the reason above stated that it has been adopted here with respect to bills of exchange. But Mr. Willes further contended that, though the rule might be true with respect to bills of exchange, it did not apply to promissory notes, inasmuch as they are not put upon the same footing as bills of exchange by the statute law. The negotiability of promissory notes was created by

the Statute 3 & 4 Anne, c. 9, which recites that "notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person" (that is one of the properties promissory notes are recited not to have); "and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same." That appears to apply to cases of the original liability on a note, as well as to those cases where the liability has been created by the assignment of that instrument. Now, bills of exchange and promissory notes differ from other contracts at common law in two important particulars: first, they are assignable, whereas choses in action at common law are not; and, secondly, the instrument itself gives a right of action; for it is presumed to be given for value, and no value need be alleged as a consideration for it. In both these important particulars, promissory notes are put on the same footing as bills of exchange by the statute of Anne; and therefore we think the same law applies to both instruments. This court was of this opinion in a case of *Mayhew v. Cooze*,¹ in which there was a plea similar to the present, although the expression of that opinion was not necessary for the decision of that case. The plea is, therefore, good after verdict.

*Rule absolute accordingly.*²

¹ 23d November, 1849, not reported.

² *Black v. Peele*, Doug. 248; *Walpole v. Pulteney*, Doug. 249; *Ellis v. Galindo*, Doug. 250, n.; *Dingwall v. Dunster*, Doug. 247 (*semble*); *Aston v. Pye*, 5 Ves. 350, n.; *Stevens v. Thacker*, Peake, 187 (*semble*); *Farquhar v. Southey*, M. & M. 14 (*semble*); *Nolan v. Bank of New York*, 67 Barb. 24 (*semble*), *accord*.

Shaw v. Pratt, 22 Pick. 305; *Smith v. Bartholomew*, 1 Met. 276; *Carrier v. Jones*, 68 N. Ca. 127. But see *Henderson v. Henderson*, 21 Mo. 379; *Miller v. Tharel*, 75 N. Ca. 148; *Campbel's Estate*, 7 Barr. 100, *contra*.

See *Parker v. Leigh*, 2 Stark. 228; *Adams v. Gregg*, 2 Stark. 531; *Kemp v. Watt*, 15 M. & W. 681; *Ralli v. Dennistoun*, 6 Ex. 483; *McManus v. Bark*, L. R. 5 Ex. 65.

The surrender of a note by the holder to the maker is an extinguishment, and no indorsement is necessary. *Sherman v. Sherman*, 3 Ind. 337; *Peabody v. Peabody*, 59 Ind. 556; *Hale v. Rice*, 124 Mass. 292. The holder may also extinguish a note by destroying it. *Gilbert v. Wetherell*, 2 S. & S. 258.—ED.

RICHARD ATTENBOROUGH v. MACKENZIE.

IN THE EXCHEQUER, APRIL 22, 1856.

[*Reported in 25 Law Journal Reports, Exchequer, 244.*]

ACTION on a bill of exchange for £400, drawn by the defendant, accepted by one Tingay, indorsed by the defendant to Tingay, by him indorsed to Robert Attenborough (the plaintiff being Richard), and by him to the plaintiff.

Pleas : first, denying the indorsement to Tingay ; secondly, denying the indorsement by Tingay to the plaintiff ; thirdly, that, while the bill was in the hands of the drawer and payee, and before it was due, the acceptor, Tingay, paid the defendant the amount (less the interest), and deposited the bill with Robert Attenborough, who fraudulently transferred it to the plaintiff.

Issues were joined on these pleas ; and at the trial, before Alderson, B., it appeared that the defendant, having money due from Tingay, got him to accept the bill, and gave it to one Score to get it discounted. Score offered it to one Barton for that purpose, who took it to Tingay, and got from him £375, which was offered to the defendant, and by him accepted, he at the same time observing that he took it because the bill was in Tingay's hands, and that he, the defendant, was thereby discharged. But it did not appear that this had been communicated to Tingay. Before the bill was due, Tingay transferred it to Robert Attenborough on discount, and afterwards said "that all that he knew Robert Attenborough knew." After the bill was due, it came to the plaintiff. The learned judge, upon this state of facts, directed a verdict for the plaintiff, reserving to the defendant leave to move to enter a verdict on either of the pleas.

A rule having been obtained accordingly, but no one appearing to show cause,

Bovill and *Honyman*, for the defendant, were called upon to support it. The acceptor, Tingay, had no authority to transfer the bill, either actual or legal.

[MARTIN, B. He did not require any authority other than that which was involved in the transfer of the bill to him for discount.]

That transfer by the defendant was on the understanding that it should not be transferred by Tingay, and that he took it to retire it as acceptor, and in discharge of the drawer.

[POLLOCK, C. B. The transfer of a bill cannot be clogged with any such secret condition, whether it be to the acceptor or any one else.]

It was mentioned to the agent who came from Tingay.

[ALDERSON, B. But not communicated to him.]

[MARTIN, B. On the expiration of a reasonable time after the agent brought the money, the transfer to Tingay, as indorsee, was complete; and, if the defendant did not mean to make such a transfer, he should have returned the money.]

The evidence is that Robert Attenborough knew what Tingay knew, and therefore knew that the bill was not to be transferred.

[POLLOCK, C. B. Why not? Assuming that he knew all that Tingay knew, nothing that Tingay knew precluded his transfer of the bill.]

If a party take a bill, knowing that the transferrer had no authority to transfer, it is not a valid indorsement. *Marston v. Allen*.

[MARTIN, B. No "authority" was necessary. The interest in the bill was transferred to Tingay, who was a *bona fide* holder for value.]

Then, assuming the indorsements are, *prima facie*, proved, the special plea was sustained. Payment by the acceptor discharges the drawer. *Morley v. Culverwell*.

[POLLOCK, C. B. Payment in due course, and payment *as payment*. In this case, the money was paid before the bill was due, and by way of discount, not payment.]

The acceptor cannot reissue the bill after paying the amount, less the discount, in order to charge parties upon it, to whom he himself will be liable.

[POLLOCK, C. B. Not after paying it in due course. But this was not payment, it was discount; and, as regards discount, the acceptor is in the same position as any other person. It cannot be contended that an acceptor or *bona fide* holder of a bill, by discounting it before it is due, cannot reissue it.]

Not if he is ultimately liable upon it.

[POLLOCK, C. B. He is always ultimately liable, except in the case of accommodation acceptances.]

It is clear the defendant understood that the bill was discharged.

[MARTIN, B. That only shows that he mistook the law.]

POLLOCK, C. B. When a bill has been created according to the custom of merchants as a real commercial transaction, it is part of the general circulating medium of the country; and the acceptor, after its issue, stands with regard to a retransfer of it to him in the same position as any other person. He may indeed pay it to discharge it, but discounting it is not paying it; and, if he discounts it, he may reissue it. Nothing will discharge the drawer but payment according to the law-merchant. That is the doctrine of *Morley v. Culverwell*. Here the bill was not satisfied.

MARTIN, B. The defendant was bound, by the transfer to Tingay, when he took the money of Tingay. He could not retain Tingay's money on any other terms than those which Tingay understood, — the general terms of discount. He could not attach to the transfer secret terms or conditions of which Tingay never heard. If, indeed, there had been a bargain with Tingay not to transfer the bill, that would have been a bar to the action; but nothing of the kind appeared. As to the case of *Morley v. Culverwell*, it confirms this view. There the bill was satisfied: here it was not. It was merely discounted.

ALDERSON, B., concurred. If an acceptor discounts a bill, he may reissue it. *Rule discharged.*¹

COOK AND OTHERS *v.* LISTER.

IN THE COMMON PLEAS, JANUARY 19, 1863.

[*Reported in 32 Law Journal Reports, Common Pleas, 121.*]

THIS was an action which came on for trial before Erle, C. J., when, by consent, a verdict was entered for the plaintiffs, subject to the opinion of the court upon a special case.

The facts were very long and complicated, but the following short statement of them will suffice for the present purpose.

The plaintiffs were wool-brokers, carrying on business in London and Liverpool. The defendant, Cheesebrough & Son, and Yewdall & Son, were all wool-merchants, carrying on business at various places, and having large transactions with the plaintiffs and with each other. Considerable quantities of wool were from time to time consigned from one of these parties to the other, against which consignments acceptances were drawn in the usual way, so long as money was plentiful. But in October, 1857, in consequence of an unusual pressure in the money-market, a system of drawing and accepting bills, and renewing them as best they could, was commenced by the defendant, by Cheesebrough & Son, and by Yewdall & Son; and it will be seen by the judgment of the court that, though the bills so drawn were not, strictly speaking, accommodation bills, they were considered to be very much in the nature of accommodation bills.

When these transactions were brought to a close, there were in the

¹ *Pollard v. Ogden*, 2 E. & B. 459; *Desha v. Stewart*, 6 Ala. 852; *Rogers v. Gallagher*, 49 Ill. 182; *Kipp v. McChesney*, 66 Ill. 460; *Conwell v. Pinnell*, 11 Ind. 527; *West Boston Bank v. Thompson*, 124 Mass. 506; *Rockingham Bank v. Claggett*, 29 N. H. 292; *Borst v. Bovee*, 5 Hill, 219; *Swope v. Ross*, 40 Pa. 186, *accord*.

Howe v. Hadden, 6 C. L. J. 446; *Beebe v. Real Estate Bank*, 4 Ark. 546; *Long v. Bank of Cynthia*, 1 Litt. 290; *Stark v. Alvord*, 49 Tex. 260, *contra*. — Ed.

hands of third parties bills drawn by Cheesebrough & Son upon and accepted by the defendant, to the amount of £100,000, for which the defendant had received consideration to the amount of £60,000 only. At the same time, Yewdall & Son had drawn upon the defendant, and the defendant had accepted a bill for £14,000, the only consideration for which received by the defendant was Yewdall & Son's acceptance for £10,000. In this state of things, each of these parties suspended payment, and their estates were, in each instance, wound up under inspection and a deed of arrangement; but the plaintiffs did not sign the defendant's deed of arrangement.

At the time of the suspension of Cheesebrough & Son and the defendant, there were in the hands of the plaintiffs five bills drawn by Cheesebrough & Son upon and accepted by the defendant, and by Cheesebrough & Son indorsed to the plaintiffs. Upon these bills there were paid to the plaintiffs, as holders, by the inspectors under the defendant's deed of arrangement, two dividends of 6s. 8d. in the pound, with interest. A further dividend of 1s. 4½d., with interest upon the same bills, was paid to the plaintiffs, out of certain wool in the hands of Cheesebrough & Son at the time of their bankruptcy, by a special arrangement between their creditors and those of the defendant, and the plaintiffs. And a fourth dividend of 4s. in the pound, with interest on these bills, was paid to the plaintiffs by the inspectors, under Cheesebrough & Son's deed of arrangement.

At the time of Yewdall & Co.'s suspending payment, the plaintiffs also held one bill drawn by Yewdall & Co. upon and accepted by the defendant, and by Yewdall & Co. indorsed to Cheesebrough & Son, and by them indorsed to the plaintiffs. Upon this bill also, the plaintiffs, as holders, had received under the defendant's deed of arrangement two dividends of 6s. 8d. in the pound, with interest; a further dividend of 1s. 4½d., with interest, was paid to the plaintiffs, out of the wool in the hands of Cheesebrough & Son, under the arrangement above mentioned; and a fourth dividend of 5s. 7½d., in the pound, with interest on this bill, was paid to the plaintiffs under Yewdall & Son's deed of arrangement.

The defendant now offered to pay to the plaintiffs the amount of principal, interest and expenses due on all these bills, after taking credit for all the above payments which the plaintiffs had received upon them. The plaintiffs, however, claimed the balance of principal and interest upon all the bills, after crediting the defendant with those amounts only which were received from his estate, and they refused to credit him with the amounts received from Cheesebrough & Son's and Yewdall & Son's estates respectively; and they brought their action upon the bills for the balance thus calculated accordingly. The defendant

paid into court the amount due upon the balance, calculated according to his contention.

The questions for the opinion of the court raised the point whether the defendant was entitled, as acceptor, to take credit for the amount paid out of Cheesebrough & Son's and Yewdall & Son's estates respectively.

M. Smith (*W. Williams* with him), for the plaintiffs.

Bovill (*Manisty* and *Cleasby* with him), for the defendant.

M. Smith, in reply.

The question is so fully discussed in the judgments of the court that it is not necessary to state the arguments of counsel.

ERLE, C.J. I am of opinion that our judgment ought to be for the defendant. The action was brought on a bill accepted by the defendant: money was paid into court, but by agreement any available defence is open to the defendant. The plaintiffs, as holders, have received (with the money paid into court) 20s. in the pound on the bills, and interest in full; and it is certainly, therefore, a somewhat surprising proposition that they have any further right to maintain this action. Under some circumstances, unquestionably, an action may be maintained upon a bill, even after it has been paid in full. It is said by my brother Byles, in his work on Bills of Exchange (8th edit. p. 205), "The acceptor being the principal, and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder *pro tanto*, and makes the acceptor liable to the drawer for money paid to his use; and that, if the drawer pay the whole bill, nominal damages only can be recovered by the holder of the acceptor. The better opinion, however, seems to be that, to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer, when the holder afterwards recovers against the acceptor. But payment by the drawer of an accommodation bill is a complete discharge of the bill." On that very peculiar doctrine the plaintiffs rely in this case. They admit that they have got all that they are entitled to; but they claim to go on with this action, in order that they may obtain judgment against the acceptor, and so constitute themselves trustees for the drawer to the extent to which they themselves recover.

Now, what is the position of these parties? They were all engaged in trade, and bills passed between them in the usual course. In October, 1857, in consequence of the unusual pressure then existing on the money-market, it became necessary for the defendant, and Cheesebrough & Son, and Yewdall & Son to raise money by large bill transactions; and, though these were not strictly accommodation bills, the result was that there was a very large amount of the defendant's ac-

ceptances in the hands of Cheesebrough and Yewdall, and that the balance as between those parties was very largely in favor of the defendant. On these acceptances, which the plaintiffs hold, they are paid from time to time various amounts out of the defendant's estate under his deed of arrangement, and also other amounts out of the estates of Cheesebrough & Son and Yewdall & Son respectively, and the balance is now paid into court by the defendant. Then it is that the plaintiffs say, "We require the defendant to pay us over again the money that has been paid to us by Cheesebrough & Son and Yewdall & Son, the indorsers of the bills, in order that we may pay it back to them."

It seems to me, however, that it would be monstrous and irrational that the law should allow the plaintiffs to interfere between the defendant and Cheesebrough & Son, and between the defendant and Yewdall & Son, and that the plaintiffs should recover from the defendant money which they are to hold as trustees for those parties. To a certain extent, it may be reasonable that the holder may sue the acceptor, notwithstanding the bill has been paid by the drawer, because it may be more convenient for the holder to sue the acceptor in his own name on the bill than for the drawer to sue him. It has been said that in that case he would become a trustee for the drawer. It may be doubtful whether he is such a trustee as that a bill could be maintained against him by the drawer in a court of equity. In *Pownal v. Ferrand*,¹ it was held that, if the indorser paid the bill, he could have his action against the acceptor for money paid to his use, although he was not the holder of the bill. And in *Callow v. Lawrence* it was held that the drawer of a bill payable to his own order, and indorsed by him to another, could, notwithstanding that he had paid the bill to the indorsee, negotiate the bill afresh, and that the transferee could sue the acceptor.

But the question is whether, under the circumstances of this case, the plaintiffs can maintain their claim to recover from the defendant money which they are to hold for the benefit of the drawers.

If it be said that there is a contract by the acceptor of a bill of exchange to pay 20s. of his own money, in some sense that has been sanctioned; but I cannot think it reasonable to apply that strictly to a case like this. The case of *Jones v. Broadhurst* was much relied on by the counsel for the plaintiffs. But considering that courts of justice are instituted for the purpose of enabling a creditor to recover his debt, and not a great deal more than his debt, that case went a very long way. It does not warrant the proposition for which it is now cited; namely, that in every case, except that of a strict accommoda-

tion bill, the holder is entitled to sue the acceptor for the whole amount due on the bill, notwithstanding that he has received payment, or part payment, from the drawer. All that was necessary to be decided in that case was whether or not, after verdict, a plea alleging simply that goods had been delivered by the drawers to the plaintiffs in satisfaction of the bill, and of all damages and causes of action in respect thereof, was good. The court held that it was not; but I cannot but observe that much of the learning and industry brought to bear on that judgment is beside the real question.

The case of *Randall v. Moon*¹ is very distinguishable, as I understand it. It is the ordinary case of a class of which in my early days there was a great number at every sittings. The holder frequently brought actions contemporaneously against the drawer and acceptor, and took a verdict and judgment against both. And, if it so happened that the drawer paid the holder of the bill, the court would not allow the damages in the action against the acceptor (there being no plea of payment) to be reduced thereby. But that is quite a different case from the present, and I do not think it stands at all in our way.

I consider, on the fair view of this case, looking to the position of the parties and the nature of the transactions between them, and the circumstance that the plaintiffs have got what they are entitled to, to the full amount, that they have no further claim against the acceptor; and that it would be a perversion of law and of justice to permit them to recover in this action money which is to be held by them as trustees for somebody else; and, as my learned brothers concur in this view, there will be judgment for the defendant.

WILLIAMS, J. I am of the same opinion. There are certain propositions of law connected with this case which cannot now be disputed. I consider that the case of *Jones v. Broadhurst*, which was very fully and maturely considered, has established the general proposition, that to an action by the holder of a bill against the acceptor payment by the drawer is no plea. It may be right to consider what is the principle on which this court arrived at that conclusion, because from the early part of the report of that case it would seem that the Lord Chief Justice and Mr. Justice Coltman considered that the plea was a good plea. It was an action brought against the acceptor of a bill of exchange, and there was a plea setting up a satisfaction of the cause of action by the delivery of goods by the drawer to the plaintiff; and it would seem that, when the court took time to consider, the inclination, at all events in the minds of two of the members of the court, was that the plaintiff, the indorsee, had received and accepted the goods that were given to him by the drawer in full satisfaction of

¹ 12 Com. B. Rep. 261.

all claims upon the bill; and then the only point left to be considered was whether this, coming from a stranger to the cause of action, was an answer to the action against the defendant; and the court took time to consider, in order to look into the authorities on that subject, and very fully they were looked into by Lord Truro, who showed his characteristic diligence in looking into all the cases. But in the course of the investigation the court appears to have altered their minds as to what the meaning of the plea was, and to have made it unnecessary to decide the point whether the plaintiff was prevented from maintaining his action by having received the goods in satisfaction of his claim from a third party, by coming to the conclusion that the plea did not set up that the goods were received in satisfaction of the right of action against the acceptor, but only that they were received in satisfaction of the right of action against the drawer, and therefore it was no answer at all to the plaintiff's claim. The principle, no doubt, on which that was decided, was that there being, by the nature of the transaction, a vested right of action in the holder against the acceptor, that right of action, according to the ordinary rule of law, must be got rid of by a release or by an accord and satisfaction. There must be either the one or the other.

In the case of *Belshaw v. Bush*,¹ the point that was not decided (although the authorities were collected) in *Jones v. Broadhurst* again came on for consideration, and the court held that, where there was a satisfaction by a third party adopted and assented to by the defendant, that was a good answer to the action; but I only allude to that because my brother Maule, in the course of delivering the laborious and learned judgment which he pronounced on that occasion, takes occasion to cite the case of *Jones v. Broadhurst*, and he says: "The declaration shows debts, and goods sold and delivered, &c., by the plaintiff to the defendant; and it is not to be presumed that there were other causes of action in respect of such debts than those of the creditor against the debtor. In this respect, the plea differs from that in *Jones v. Broadhurst*, where the action was by the indorsee against the acceptor of a bill of exchange, and the plea stated that the drawers delivered to the plaintiffs, and the plaintiffs accepted divers goods in full satisfaction and discharge of the bill of exchange, and of all damages and causes of action in respect thereof. And the court held that the drawers being parties to the bill, and consequently liable to pay it, the satisfaction and discharge mentioned in the plea must be understood to apply to the liability as drawers of those who deliver the goods, and not to that of the defendant as acceptor."

I apprehend the principle of that case at all events was confirmed

¹ 11 Com. B. Rep. 191.

in the subsequent case of *Randall v. Moon*; but the general proposition is established by those authorities, that to an action by the acceptor payment by the drawer is no plea. To that proposition a qualification has also been established; namely, that which is laid down in my brother Byles's book, that payment by the drawer of an accommodation bill is a complete discharge of the bill. Now it is not necessary to decide it in this case, but I must admit that I have some doubts whether that proposition as generally laid down is correct, unless you add to it, "supposing the holder has notice that the bill was an accommodation bill at the time of payment." The foundation I have for those doubts is as follows: I have already attempted to show that the reason why it was held in *Jones v. Broadhurst* that, in an action against an acceptor, payment by the drawer is no plea, was that the court considered that the money could not be treated as having been paid and received in satisfaction of the claim against the acceptor; and it is quite obvious that, in order to get accord and satisfaction, you must have the mind both of the person who pays the money and the person who receives the money, or receives the goods, consenting. My difficulty consists in seeing how, if the holder of the bill is not aware when he receives the money from the drawer that the bill is an accommodation bill, he can be regarded as having accepted the money in satisfaction of his claim as against the acceptor. On the other hand, if he knows that it is an accommodation bill, then he knows that virtually the drawer is in the situation of acceptor; that is to say, he is the person on whom the ultimate responsibility of paying the bill must rest. The doubt I have just mentioned is confirmed by what took place in the case of *Randall v. Moon*, to which I have before alluded, because there, as my Lord has already said and explained, the attempt was made to set up in the action brought against the acceptor the payment made in the action against the drawer; and, it being urged that it was an accommodation acceptance, Jervis, C. J., said: "It seems to me that the payment and acceptance of the money under the judge's order, in the action by the plaintiff against Turner, the drawer, the plaintiff having no notice that Moon was an accommodation acceptor, cannot be considered as a payment on behalf of the acceptor, or an acceptance in satisfaction and discharge of the causes of action against the acceptor, because the right of action for damages had vested at the time."

However, although I thought it right to express the doubts I feel on the subject, it is, as it seems to me, not material now to decide how the law is with reference to that point, because, assuming that the action can be maintained by the holder against the acceptor, notwithstanding the payment made by the drawer, the question remains to be

considered, what is the amount of damages that is recoverable under such circumstances. Now, where the bill is not an accommodation bill,—that is to say, the acceptor is the person out of whose pocket the money to meet the bills must come,—then it should be held, as was held in the case of *Jones v. Broadhurst*, that, notwithstanding the payment by the drawer, the holder may recover the whole sum against the acceptor, because he is the person who is to pay the whole of the money ultimately; and that, when the holder has so recovered from the acceptor, to the extent to which he has already been paid by the acceptor, he shall hold the money so recovered as trustee for the drawer.

But a totally different consideration arises where, by reason of its being an accommodation bill, it is impossible to look at the holder, supposing he was allowed to recover the whole amount, as holding that difference as trustee for the drawer. Therefore, it seems to me that, where it appears that the bill sued on is an accommodation bill, even supposing that the holder had no notice of it at the time he received payment from the drawer, yet that payment must be taken in mitigation of damages, and that the holder can recover no more than the difference between the amount of the bill and that payment.

If that is so with respect to an accommodation bill, it would follow in principle that it would be the same in all cases where, supposing the holder to recover the whole of the money due on the bill, the state of things between the acceptor and the drawer is such that it would be contrary to justice that the money, when recovered, should be held in trust for the party who had first paid it. In such a case as that, I think it is plain that the first payment ought to be allowed in reduction of damages.

If that is so, applying those principles to the present case, and looking at all the circumstances, it is clear to me that enough is paid into court to satisfy all the damages, and the defendant is entitled to judgment.

WILLES, J. I am of the same opinion, and desire to express my entire concurrence in the opinion expressed by my brother Byles, in the 8th edition of his book, p. 158: “After a partial payment at maturity by the acceptor, or any other party really the principal debtor, the holder cannot recover of the acceptor more than the balance.” I apprehend that that is good sense and good law; and it is only necessary to bear in mind one or two of the elementary considerations affecting the law of bills of exchange, for the purpose of being satisfied that it is so. Its good sense is obvious. Bills of exchange, as everybody knows, rest on peculiar considerations: that which is most peculiar is that they pass by indorsement, giving a right of action to successive holders. That which appears to me to be equally elementary

is this: that the holder of a bill of exchange is entitled to no more than the principal, and also interest on the bill, if the jury see fit to give it; and if I am told there is any law that the holder of a bill of exchange, having been paid by perhaps the sixth indorser of the bill the amount of the principal and interest up to the date of payment, is entitled afterwards to sue each of the other five indorsers for one farthing each, I say that that is a proposition which is absurd in its statement, and which has no existence in the custom of merchants.

The law as to accord and satisfaction (strictly so called) after breach is in my judgment wholly inapplicable to bills of exchange, because by the custom of merchants to be found laid down, not only in the law of this country, but in the law of all commercial countries that deal with bills, a bill of exchange, even after breach, may be discharged without accord and satisfaction by the assent of the holder. It is only necessary that he should assent to his having no longer any claim on the bill. A very remarkable case of that kind occurred not many years ago, where a person, having lent a relative a large sum of money, took as security a promissory note, payable on demand, and before he died, being anxious that the relative should have the full benefit of the money, handed to him a receipt in full for the amount of the note. He died; and the executors brought an action on the note, contending that accord and satisfaction was necessary for the purpose of discharging the liability on the note after it had become due. Lord Campbell at Nisi Prius, and the Court of Exchequer afterwards, held that the doctrine of accord and satisfaction was inapplicable to bills of exchange and promissory notes, and that there was a sufficient discharge by the testator having expressed his intention in his lifetime, though after the note was due, not to sue upon it. *Foster v. Dawber*. The law on this subject is referred to in my brother Byles's book at page 182; and questions arising on bills of exchange are not to be dealt with, in my opinion, upon technical rules with respect to accord and satisfaction, but we are to see whether the holder has got that which he is entitled to on the bill in moneys numbered. And I further desire to add, that it appears to me to be perfectly indifferent whether the payment is made by the debtor, or whether it is made by a stranger.

One of the doctrines laid down in *Jones v. Broadhurst* (perhaps not necessary for the decision of that case: if it were, I should not venture to express any opinion in opposition to it), is this: if a stranger pays A.'s debts, A. not knowing of it, and therefore not assenting to it, until he assents to it, it is no payment of the debt at all; but the creditor, having received the whole amount of it, may get it over again against the debtor. I desire to say that I do not, as at present advised,

assent to that proposition. The authorities in this country before the suggestion was made in the case referred to consisted of one case which is reported differently by Croke and Rolle. *Grymes v. Blofield*.¹ But I apprehend that it is contrary to the maxim of the civil law, *debitorem ignarum seu etiam invitum solvendo liberare possumus*. It is also contrary to the well-known principle of mercantile law with respect to payment : because, if a stranger pays a portion of a debt in discharge of the whole demand, the debt is gone, though if the debtor pays a part of the debt in discharge of the whole, the debt remains due, because it would be a fraud on the stranger to proceed. So, in the case of a composition made with several creditors, the debt is discharged, because it would be a fraud on the other creditors to proceed further. And then, with respect to the assent of the debtor, I apprehend that it is a well-known principle of law that a benefit conferred upon a man is presumed to be accepted by him until the contrary be proved ; and, if it were necessary to ascertain that, and the *invitum* in the civil law is to be excluded from our law, then I say, according to the familiar authorities, the assent of the debtor ought to be presumed. I own I look with very great caution on the path which I am invited to tread, and at the first step of which I am obliged to adopt the affirmative of propositions which appear to me, according to my best judgment of the state of the law, not to be orthodox. There are considerations, no doubt, applicable to the case of payment of part of a debt, which are quite different. If you pay the whole debt, I should have thought the proper conclusion was that the right goes back to the person who paid it. I apprehend that the case of *Randall v. Moon* may well be supported, on the ground that it was not a payment of the whole debt, or taken as such, because costs had been incurred in the action against the acceptor, and they had become part of the right of the holder, as accessory to his principal debt.

But if payment by an indorser be no answer to the action, ought it to be allowed in mitigation of damages ? I apprehend, where the whole debt is paid, that it clearly ought. Where part of it is paid, the matter admits of some qualification, because there is another class of cases to which reference ought to be made, for the purpose of determining this : I mean that class of cases in which an attempt has been made to indorse for part, where an indorsement is made, not as on a sale of the bill, but an advance only of part of the money, with an intention of transferring the rights of the bill to the indorsee. There, where the indorsee gets the right to recover the whole money, he would be necessarily the trustee of the drawer for the amount he secures beyond that which he has advanced. That is the case of *Reid*

¹ Cro. Eliz. 541 ; Roll. Abr. 471.

v. Furnival,¹ referring to the case of Johnson v. Kennion, in which the law is so laid down; and in that case the agreement between the parties must have been this, and the indorsement must have been so construed, otherwise the intention of the parties could not be carried into effect. The whole right of action passes to the indorsee, who is necessarily a trustee to the extent of the sum exceeding that which he has advanced upon the bill, and it may be, where part of the sum is paid upon the bill, that the same rule ought to apply. Certainly, I apprehend that it ought not to apply, unless there be no other mode of doing justice between the parties. Why the Court of Chancery is to be invoked for the purpose of settling the rights of parties on bills of exchange, I am quite unable to see. That expression, "he is a trustee for the rest," may or may not mean that there is such a trust as may be enforced in the Court of Chancery. I should have thought that an action for money had and received would lie the instant the indorsee himself received more than he was entitled to. I should have thought that the drawer might have brought an action for money had and received, as in Pownall v. Ferrand he brought it for money paid. And when it was said by Mr. Baron Bayley, in the case of Reid v. Furnival,¹ that the indorsee would be trustee, that meant no more than that the beneficial interest would be in the indorser, and not that a bill in Chancery must be necessarily filed by the drawer for the purpose of getting payment of what he was entitled to. I apprehend that it is not a trust for the Court of Chancery, but that it is a confidence such as arises in many cases out of a contract in a mercantile transaction, from which the law implies a promise to pay money. If it was a trust, I apprehend that the proper course would be for a court of law to shut its eyes altogether, and to refuse to acknowledge it at all, rather than to say there is a trust, and not to allow it to be assailed by any evidence. I own I entertain a clear opinion, which, perhaps, I might have more properly expressed in the words of my brother Byles, that in each case with reference to bills of exchange, if a question arises who is the principal debtor, *prima facie* the acceptor is the principal debtor; and then, in order, the drawer and the indorsers, as their names appear upon the bill. But the court is bound to test the evidence to show that in any case the person who is not the principal debtor on the face of the bill is, in fact, the principal debtor; and, if he is the principal, he is the agent to pay for all those debtors subordinate to him, including the acceptor; and that is, as it seems to me, the position of Cheesebrough & Co. and Yewdall & Co. in respect of the bills to which they are parties.

KEATING, J., concurred.

Judgment for the defendant.

¹ 1 C. M. & R. 538.

AGRA AND MASTERMAN'S BANK, LIMITED, *v.* LEIGHTON.

IN THE EXCHEQUER, NOVEMBER 19, 1866.

[*Reported in Law Reports, 2 Exchequer, 56.*]

THIS was a consolidated action on two bills of exchange for £3,000 each, dated the 19th of December, 1865, drawn by the Blakeley Ordnance Company upon, and accepted by, the defendant, payable respectively at three and four months after date, and indorsed to the plaintiffs. Both actions were commenced by writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67).

Third plea:¹ that, whilst the bills were in the hands of the plaintiffs, as holders, one T. A. Blakeley² paid to the plaintiffs the full amount due to them in respect of the bills, and became entitled to become the holder of them, yet the plaintiffs did not deliver the bills to him, but are now suing on them without his authority, or the authority of any other person entitled to maintain an action upon the bills, or either of them.

Demurrer and joinder.

Cohen (Coleridge, Q. C., with him), in support of the demurrer. The third plea is clearly bad on the authority of *Jones v. Broadhurst*, which shows that satisfaction by the drawer furnishes no defence to the acceptor, whose contract with the indorsee is entirely distinct and separate. It does not aver that the payment was made at the request or on behalf of the defendant; nor that there was in the payment any privity between him and Blakeley; nor that the payment was on any contract that the bill should be delivered up; nor does it even say that the plaintiffs are suing against the will or contrary to the order of Blakeley, but only that they are suing "without his authority." All that appears is that some stranger has paid the amount of the bills to the plaintiffs, who may be now suing (consistently with the plea) as trustees for him.

Sir George Honyman, Q. C. (M'Intyre with him), in support of the plea. The third plea is good. The statement is here made which was wanting in the plea in *Jones v. Broadhurst*, that Blakeley became

¹ Only so much of the case is given as relates to this plea. The fourth plea, alleging on equitable grounds a set-off against the payee, was held good on demurrer. — ED.

² Blakeley and the Blakeley Ordnance Company were treated as identical; and the company was supposed to consist of Blakeley and one other person.

entitled to become the holder of the bills, and that the plaintiffs are suing without the authority of any person entitled to maintain an action upon the bills. This statement is inconsistent with the notion that the bills have been left in the hands of the plaintiffs in order that they might sue upon them.

Cohen, in reply.

The court then delivered judgment on the demurrer.

BRAMWELL, B. I think the third plea is bad. The plea is, if I may say so, bad, because it is not good, when the pleader might so easily have made it good if he had chosen. To make it good, this meaning must be given to it, that the plaintiffs were not the lawful holders of the bills at the time when the action was brought. But this is not the true meaning of the plea, because the payment of the full amount due, which is the ground of the defence stated, has no such necessary consequence. The payment may have been made on account, or for many different reasons, and not as a satisfaction of the bills. But it is further said that Blakeley, by such payment, became entitled to be the holder of the bills. Possibly; but it is quite consistent with this, that although, if he had insisted upon it, the plaintiffs must have delivered the bills to him, yet he did not so insist; and they continued to have the *de facto* possession of the bills, and were entitled to the remedies of holders against the defendant. Whether, if the plea had alleged that the plaintiffs were not, at the commencement of the action, the lawful holders of the bills, it would have been a good plea, I will not say; but I can conjecture the reason why this was not said. The bills may have been purposely left in the hands of the bankers, as a further security in the event of the other discounted bills being dishonored; so that though, in one sense, all was paid, yet it would not be true that the plaintiffs were not entitled to sue. I must therefore hold the plea to be bad, because I cannot see that it is good.

CHANNELL, B. I am of the same opinion. On the third plea, I have had some doubt whether it might not be upheld, as alleging that the plaintiffs, at the commencement of the suit, were not holders of the bills,—not saying that they were not in possession of the bills, but that they were not holders with a right to sue. But, on the ground suggested by my brother Bramwell, I think the plea fails. If upheld at all, it must be on the ground that the plaintiffs were tortious holders of the bills; but it stops short of stating circumstances which require that inference. It does not say that the plaintiffs sue against the will of Blakeley, but only that they sue without his authority; and it is consistent with this averment that Blakeley has not interfered, and that they are therefore entitled to sue.

FIGOTT, B. I am of the same opinion. It is consistent with the

facts stated in the third plea that the plaintiffs are rightfully in possession of the bills, with the ordinary rights of action of holders: it is therefore bad.

Judgment for plaintiffs on demurrer to third plea.

WOODWARD AND ANOTHER v. PELL.

IN THE QUEEN'S BENCH, NOVEMBER 27, 1868.

[*Reported in Law Reports, 4 Queen's Bench, 55.*]

DECLARATION on a bill of exchange drawn upon the defendant by Edward Cresswell & Sons to their own order, accepted by the defendant, indorsed by Edward Cresswell & Sons to Henry William Cresswell, and by him indorsed to the plaintiffs.

There were also the money counts.

The plea and replication to the first count, on which issue was joined, disclosed the same facts as are given more in detail in the case; and, as the court had power by agreement to amend the pleadings, it is unnecessary to set them out.

At the trial before Keating, J., at the Gloucester summer assizes, 1866, a verdict was found for the plaintiffs for £300, subject to the opinion of the court upon the following case:—

The bill of exchange upon which the action is brought was a bill for £300, dated the 7th of August, 1865, payable to drawer's own order, four months after date, drawn by Edward Cresswell & Sons upon and accepted by the defendant. The bill was duly indorsed by Edward Cresswell & Sons to Henry William Cresswell: he indorsed it in blank, and handed it to J. C. Hodges, who indorsed to his bankers, the Metropolitan and Provincial Banking Company; and they held the bill, as such indorsees, at maturity.

The bank commenced three actions upon the bill against the defendant, against Edward Cresswell & Sons, and against Henry William Cresswell.

In the action by the bank against H. W. Cresswell, the indorser, the writ was issued on the 15th of January, 1866. On the 13th of March, 1866, H. W. Cresswell, for the purpose of taking up the bill, handed over to J. C. Hodges securities for an amount equal to that of the bill; and out of the proceeds of those securities, and on behalf of H. W. Cresswell, Hodges paid, on the 21st of March, 1866, the amount due on the bill to the Metropolitan and Provincial Banking Company; whereupon, on the 3d of April, an order was made to stay proceedings on payment of costs. The bill remained in the hands of the bank until

the costs were taxed and paid. The costs were taxed at £21 11s. 4d., and that sum was, on the 13th of April, 1866, paid to the bank by the plaintiffs, as solicitors for, and on behalf of, H. W. Cresswell; and on the same day the bill was delivered over to the plaintiffs as such solicitors. Two or three days afterwards, and before the 31st of May, 1866, the plaintiffs, to whom H. W. Cresswell was indebted for costs in an amount larger than that of the bill, applied to him for money on account, and he transferred to them the bill, which had already been indorsed in blank by him as aforesaid, in part payment of their claim against him; but there was no further or other indorsement of the bill to the plaintiffs.

In the action by the bank against the defendant, the acceptor, the writ was issued on the 29th of December, 1865. Judgment was signed on the 3d of March, 1866; and, on the 6th of March, the bank lodged a *ca. sa.* against the defendant on the judgment with the sheriff of Middlesex, indorsed to satisfy £310 9s. 11d., being the amount due on the bill and costs, and £1 5s. costs of execution, &c. On the 29th of March, the defendant, having been arrested in another suit, was informed by the sheriff's officer that he held this *ca. sa.* The sheriff's officer communicated then with the bank, and received an order to detain defendant under their execution, which he did accordingly; and, about four hours afterwards, he received an order to discharge the defendant, on payment of £9 1s. 10d. and the fees.

This payment was made, and the defendant was released.

No receipt was given by the sheriff for the payment made to him by the defendant; but, on the 12th of April, when the sheriff paid over to the bank the £9 1s. 10d., the following receipt was given:—

“THE METROPOLITAN AND PROVINCIAL BANK v. PELL.

“Received, April 12, 1866, of Mr. Bunn, officer to the sheriff of Middlesex, £9 1s. 10d., in discharge of debt and costs herein.

“For plaintiff's attorney,

J. HOLDITCH.”

This sum of £9 1s. 10d. was the amount of taxed costs due to the bank in their action against the defendant. No further or other payment was at any time made by the defendant in respect of the bill.

The plaintiffs, on the 31st of May, 1866, and after the bill had been transferred to them by H. W. Cresswell in manner aforesaid, commenced the present action.

The court were to have liberty to make such amendments in the pleadings as the judge at Nisi Prius might have made, and to draw any inferences of fact which a jury ought to have drawn.

The question for the court was whether, upon the facts, the defendant remained liable to pay the amount of the bill to the plaintiffs.

H. Matthews, Q. C., for the plaintiffs. The bank, being the holders of the bill at maturity, commenced actions against the defendant, the acceptor, and Cresswell, an indorser. The bank obtained judgment against the defendant on the 3d of March, and lodged a *ca. sa.* on the 6th of March; but they did not take him and discharge him till the 29th. On the 21st, Cresswell paid the bill, and he then became the holder; and he could sue the defendant or any other party prior to himself, or negotiate it, as he did, and give a right to the plaintiffs. "A bill of exchange is negotiable *ad infinitum* until it has been paid by, or discharged on behalf of, the acceptor. If the drawer has paid the bill, it seems he may sue the acceptor upon the bill; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor." *Per* Lord Ellenborough, in *Callow v. Lawrence*, cited in *Byles on Bills* at p. 157, 8th ed. Judgment and execution issued against any party to a bill, without satisfaction, are no extinguishment of the debt either as against him or any other party. *Tarleton v. Allhusen*.¹ In *Thompson v. Parish*,² *Cockburn, C. J.*, after alluding to the judgment of *Littledale, J.*, in *Beard v. M'Carthy*,³ says: "With the greatest respect for the very learned judge who decided that case, I cannot help thinking that, in saying 'that taking the defendant in execution is the same as if the defendant had paid the debt and costs,' he has gone too far. The effect of taking the debtor in execution is, no doubt, to suspend all other remedies against him; but it is going too far to say that the debt is thereby altogether extinguished." And *Willes, J.*, in the same case, cites *Foster v. Jackson*⁴ as expressly laying down the law that taking a debtor in execution under a *ca. sa.* is not an actual satisfaction. *Claxton v. Swift*.⁵ Cresswell, therefore, was still liable on the bill at the time he paid it; and, although *English v. Darley*⁶ may be an authority that the bank, by releasing the acceptor from custody, discharged all the indorsers, yet that doctrine is inapplicable in the present case, as Cresswell had already paid the bill under legal pressure. This is simply the case of one of several sureties sued by the creditor concurrently with the principal debtor. And, the surety having paid under pressure of the action, he has an immediate right of action against his principal, which no subsequent act of a third person can divest.

[*HAYES, J.* Before the principal debtor had been taken or released from custody, the debt had been lawfully discharged by his surety: it

¹ 2 Ad. & E. 32.³ 9 Dowl. 136.⁵ 2 Show. 441, 503.² 5 C. B. (N. S.) 692, 698.⁴ Hob. 59.⁶ 2 B. & P. 61.

would be monstrous if the subsequent voluntary act of a third person could deprive the surety of his right of action against the principal.]

[LUSH, J. After the bill had been paid by Cresswell, could the bank have proceeded against the defendant?]

In Byles on Bills, 8th ed. p. 205, it is said: "The better opinion seems to be that to an action against the acceptor payment by the drawer is no plea."

A. S. Hill, Q. C., for the defendant. It is a fallacy to say that Cresswell paid and became the holder of the bill on the 21st of March. It was not till the 13th of April that he had perfected his right to the possession of the bill, when it was handed over to him. Up to that time, the bank were the holders of the bill, and not Cresswell; and they, by discharging the acceptor out of custody, discharged and extinguished the bill and all rights upon it. *Jaques v. Withy*.¹ Cresswell had acquired no right of action at that time.

H. Matthews, in reply. The bank had no right to the bill after it had been paid in full on the 21st of March; and therefore (conceding which is a very doubtful point, that the discharge of the acceptor from execution without payment would otherwise have extinguished the bill) the discharge of the defendant could have no operation on Cresswell's vested right of action.

LUSH, J. I had some difficulty at first; but I have come to a conclusion satisfactorily to my own mind that our judgment ought to be for the plaintiffs. The bank were indorsees and holders of the bill at its maturity. They brought actions against the defendant, the acceptor, and two indorsers of the bill. In the action against the defendant, the acceptor, the bank obtained judgment on the 3d of March; and, on the 6th of March, a *ca. sa.* was lodged with the sheriff. On the 21st of March, before the defendant was taken in execution, Cresswell, one of the indorsers who had been sued, paid to the bank the amount of the bill. If he had paid the costs also, he would have been entitled at once to the possession of the bill. Assuming, therefore, that the non-payment of the costs, to which I will advert presently, made no difference, Cresswell, having paid the bill as indorser or surety, had a right of action at once against the defendant, the principal, or person primarily liable; and this right was vested on the 21st of March. On the 29th of March, the defendant was detained in execution; and, if the bank had continued to hold him, that would have been no answer by the defendant to an action by Cresswell, and neither in my opinion would his discharge have been any answer. It would be monstrous, as my brother Hayes observed, if the act of a third person in discharging the principal out of custody could take away the prior vested right

¹ 1 T. R. 557.

which the surety had against him. The discharge was a mere voluntary act by the bank, although it might be a very proper act on their part. Then, does the fact that Cresswell had only paid the amount of the bill, and not the costs, before the discharge of the defendant, make any difference? Clearly not. He paid sufficient to cover the amount due on the bill, and specifically appropriated it to the payment of the bill; and the only effect of the non-payment of the costs was that the bank had a lien upon the bill till the costs were paid; but Cresswell's right to the bill, and his rights and remedies on the bill against the defendant, were just the same as if he had paid the costs on the 21st of March, and the bill had then been handed to him. He was then the holder of the bill. Therefore, Cresswell having this vested right of action on the bill against the defendant, it would be unreasonable in the extreme if Cresswell, the surety, were to be deprived of his right of action against the principal, because the principal, by the voluntary act of a third person, had been discharged; and Cresswell having this right of action on the bill could transfer it to the plaintiffs, who are therefore entitled to recover.

HANNEN and HAYES, JJ., concurred.

*Judgment for the plaintiffs.*¹

THORNTON AND OTHERS *v.* MAYNARD.

IN THE COMMON PLEAS, JULY 9, 1875.

[*Reported in Law Reports, 10 Common Pleas, 695.*]

THE declaration contained nine counts upon nine several bills of exchange drawn respectively by Ratty & Co. upon and accepted by the defendant, and indorsed by Ratty & Co. to the plaintiffs, and also a count upon a promissory note drawn by the defendant payable to the plaintiffs, and the money counts and a count for interest.

The defendant pleaded to the first nine counts an equitable plea, as follows: For a defence on equitable grounds as to the sum of £425, parcel of the plaintiffs' claim in respect of the first nine counts of the declaration, the defendant says that, after the acceptance of the said several bills, T. B. Jones was duly appointed trustee of the estate and effects of John Ratty & Co., and their property became and was and

¹ *Brown v. Foster*, 4 Ala. 282; *Sawyer v. Bradford*, 6 Ala. 572; *Sawyer v. Patterson*, 11 Ala. 523, *contra*.

Conf. Siddall v. Rawcliffe, 1 Cr. & M. 487; *Sawyer v. White*, 19 Vt. 40; *Claxton v. Swift*, 2 Show. 441, 494; *Hayling v. Mulhall*, 2 W. Bl. 1235.

is vested in such trustee under a liquidation by arrangement pursuant to and within the meaning of the Bankruptcy Act, 1869, part 5, and that the plaintiffs, being such holders and indorsees of the said bills of exchange as in the declaration mentioned, were, long before this suit, paid by such trustee, and received, out of the estate and effects of Ratty & Co. so vested as aforesaid, the sum of £425, to which this plea is pleaded, being a dividend on the amount of the said bills payable to the plaintiffs by Ratty & Co. as drawers of the bills, and that the plaintiffs have thence hitherto had and still have no beneficial interest whatsoever therein, and that they are suing for the said sum of £425, parcel, &c., only as trustees and agents for T. B. Jones as such trustee as aforesaid, and for the benefit of the said estate of Ratty & Co., and not otherwise; and the defendant further says that, before and at the time of the said liquidation by arrangement, Ratty & Co. became and were and still are indebted to the defendant in an amount equal to the plaintiffs' claim in respect of the matter herein pleaded to, for money payable by Ratty & Co. to the defendant for bricks and goods sold and delivered, and bricks and goods bargained and sold by the defendant to Ratty & Co., &c.; and the defendant further says that, at the time of Ratty & Co. becoming indebted to the defendant as aforesaid, they became so on the faith of the defendant being indebted to them, and of his liability to them in respect of the bills of exchange in the first nine counts mentioned; and the defendant is willing to set off and claims equitably to be entitled to set off the amount of the said debt so due and owing from Ratty & Co. to the defendant against the plaintiffs' claim in respect of the matter herein pleaded to, pursuant to the statute in such case made and provided, and also the said Bankruptcy Act, 1869.

To this plea the plaintiffs demurred, on the ground that it substantially amounted to a plea of payment by the drawers, without the acceptor being party to the transaction. Joinder in demurrer.

May 3. *R. G. Williams, Q. C. (Lumley Smith with him)*, in support of the demurrer. The substance of the plea is this: the holders of the bills have received from the drawers £425, in part discharge of their liability on the bills, and therefore quoad that sum they are suing as trustees for the drawers; and I, the acceptor, have an equitable right to set off a debt due to me from the drawers. The first part of the plea clearly affords no defence, payment by the drawers being no defence to an action against the acceptor, whether of the whole or of part of the amount of the bill: *Jones v. Broadhurst*; *Agra and Masterman's Bank v. Leighton*; and the second part depends upon the mutual credit clause of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), § 39; but that clause applies only to credits

between the bankrupt and the person suing. See *Turner v. Thomas*,¹ where Willes, J.,² says: "The 39th section of the 32 & 33 Vict. c. 71 is a section intended for the settlement of all proceedings between the bankrupt and persons dealing with him; and there seems no reason for bringing in persons standing outside, who cannot have the same benefits. It is a settlement appropriate to bankruptcy, and not to persons who are solvent. That is one reason. Another is, that the principle of *George v. Clagett*³ applies only to what may be said to be the proximate motive of dealing with the factor; and the contingency of his bankruptcy and the mode of settling accounts with his assignees cannot be said to have been contemplated. The defence here attempted to be set up is not a defence against the factor, but only a special mode of settling accounts with his assignees upon his bankruptcy, and therefore is not one of the defences falling within the principle of *George v. Clagett*. And see *Williams on Bankruptcy* p. 56. The plea, therefore, is neither good as a legal nor as an equitable defence."

Baylis, Q. C., contra, contended that the plaintiffs, having been paid a part of the amount of the bills by the trustee under the bankruptcy of the drawers, were as regards the sum so paid trustees for them, and consequently the defendant had a right in equity to set off against their claim on the bills any claim which, but for the intervention of the trust, he could have set off against the drawers. He cited *Cochrane v. Green*,⁴ *Clark v. Cort*,⁵ *Elkin v. Baker*,⁶ and *Booth v. Hutchinson*.⁷

R. G. Williams, Q. C., was heard in reply.

Cur. adv. vult.

July 9. The judgment of the court (Lord Coleridge, C. J., and Brett and Archibald, JJ.) was delivered by

LORD COLERIDGE, C. J. This was a demurrer to an equitable plea.

The declaration contained nine counts on nine bills of exchange, and it contained other counts not now necessary to be referred to. The plaintiffs were the indorsees of the bills; the defendant was the acceptor; Messrs. John Rutty & Co. were the drawers.

The defendant pleaded an equitable plea to the counts on the bills, as to £425, parcel of the amount claimed, that the drawers became bankrupt, and that the plaintiffs received £425 as a dividend on the amount of the bills due from the drawers to the plaintiffs as indorsees; and that, as regards the £425, the plaintiffs sue only as trustees for the

¹ Law Rep. 6 C. P. 610.

³ 7 T. R. 359.

⁵ Cr. & Ph. 154.

⁷ Law Rep. 15 Eq. 30.

² Law Rep. 6 C. P. 615.

⁴ 9 C. B. N. s. 448.

⁶ 11 C. B. N. s. 526.

drawers. The plea then goes on to plead a set-off of a debt due to the defendant, the acceptor, from the drawers of the bills.

We are of opinion that the plea is good. The legal position of the parties is ascertained by the case of *Jones v. Broadhurst*. The judgment of Cresswell, J., in that case reviews the authorities, and finally decides that payment either partially or in full by the drawer to the indorsee does not disentitle the indorsee to sue the acceptor for the full amount of the bill. But Cresswell, J., intimated that the indorsee, on recovering from the acceptor, was trustee for the drawer to the amount, whatever it might be, of the drawer's payment. And Sir John Byles adopts his view: "To an action," says he, "against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer, when the holder afterwards recovers from the acceptor." Byles on Bills, 10th ed. 210. And this is equally true, as the context in Sir John Byles's book shows, whether the payment by the drawer was of part of the bill or of the whole.

So far, therefore, as the first half of the plea is concerned, it would of itself be no answer to the action. The plaintiffs would be entitled to recover the amount to which the plea is pleaded, and to hold the amount as trustees for the drawers. In the case before us, however, the indorsees under the circumstances sue for the amount as trustees for the drawers; and in this state of facts the case of *Cochrane v. Green*¹ appears to be an authority in point. It was there held that a judgment debt recovered in the name of a trustee, which, if recovered in the name of the *cestui que trust*, would have been a good set-off at law against the plaintiff's claim, may be pleaded as an equitable set-off. The present is the converse case. The plaintiffs sue as trustees: the defendant sets off a debt due from the *cestui que trust*: but the principle which governs is manifestly the same; for, if the action had been brought by the *cestuis que trust*, *i. e.* the drawers, against the defendant, their debt to the latter might have been pleaded as a legal set-off. Still more directly in point is the case of *Agra and Masterman's Bank v. Leighton*. That was an action on a bill of exchange, by the indorsee against the acceptor. One of the pleas was to this effect,—that the bill was accepted by the defendant by way of payment for goods agreed to be sold and shipped for him by the drawer, and that the defendant only received a portion of the goods, amounting to £1200; that there was no consideration for the bill except the said sum of £1200; that the drawer paid the full amount of the bill to the plaintiff; and that the defendant had a set-off against the drawer to the extent of £1200. This was held a good equitable plea; and the judgment of Mr. Baron

¹ 9 C. B. N. S. 448; 30 L. J. C. P. 97.

Channell is a clear authority that the indorsee who has been paid by the drawer, when he sues the acceptor on the entire bill, sues, as regards the amount which the drawer has paid him, as trustee for the drawer; and the ground of the learned Baron's judgment is that the set-off in the case before him was of a debt due to a defendant from a *cestui que trust* in an action by a trustee.

These cases, then, and the cases of *Elkin v. Baker*¹ and *Clark v. Cort*,² appear to establish the soundness of the two propositions following: 1. That the holder, having been paid a part of the bill by the drawer's trustee, sues as regards that sum as trustee for and for the benefit of the drawer's trustee; and, 2. That, where the plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which, but for the intervention of the trust could have been set off at law, such claim can be set off in equity. If, then, these two propositions are sound, — and we think they are, — it follows that the plea is good, unless the bankruptcy makes any difference. We think it does not.

If this had been an action by the drawers' trustee in liquidation, the claim of the acceptor against the drawers' estate could have been set off at law. The substantial identity of proceedings in liquidation with proceedings in bankruptcy was held, upon a variety of authorities, by this court in *Megrath v. Gray*;³ and, since the statute of 5 Geo. II. c. 30, if this had been an action by the assignee in bankruptcy, or (now) the trustee in liquidation, the set-off could have been pleaded in a legal plea; that is to say, the set-off here would have been good at law but for the intervention of the trust, and therefore it is good in equity.

We do not think the objection to this view well founded which was suggested to follow from the case of *Turner v. Thomas*.⁴ That was a case of principal and factor; and this court declined to extend the rule in *George v. Clagett*⁵ to a case where the factor had become bankrupt and it was proposed to set off mutual credits. Willes, J., observed that the object of the mutual credit clause was to settle the affairs of bankrupts, and not the affairs of solvent persons. But that was a very different case from the present; and it is clear that, in *Turner v. Thomas*,⁴ if the action had been by the bankrupt's trustee, and for a liquidated claim, the claim of the defendant against the bankrupt's estate could have been set off.

On the whole, therefore, it appears to us that the plea is good, and that there must be judgment for the defendant.

Judgment for the defendant.

¹ 11 C. B. N. S. 526.

² 1 Cr. & Ph. 154.

³ Law Rep. 9 C. P. 216.

⁴ Law Rep. 6 C. P. 610.

⁵ 7 T. R. 359.

JOHN WHEELER v. ALBERT H. GUILD AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1838.

[Reported in 20 *Pickering*, 545.]

THIS was an action upon a promissory note dated September 1, 1835, for the sum of \$500, made by the defendants, A. H. Guild & Co., payable to Daniel G. Wheeler, Jr., or order, in three years, with interest, and indorsed by the payee in blank.

The parties stated a case.¹

Washburn, for the plaintiff. The note in suit was not paid by Stafford in the ordinary course of business, the payment being made before its maturity; and such payment was not a valid payment and discharge of the note. After the payment of the note, for which it was pledged, Brigham & Goodrich's property in it ceased. Chitty on Bills (5th ed.), 192, 358; Bayley on Bills (Phillips & Sewall's 2d ed.), 330; Kingman v. Pierce,² Hatch v. Dennis,³ Ratcliff v. Davis,⁴ Jarvis v. Rogers,⁵ Garlick v. James,⁶ Fisher v. Bradford;⁷ Story on Bailm. § 359; Bleadon v. Charles.⁸ If the pledge had consisted of any other property than negotiable notes, it would not be contended that Brigham & Goodrich could have transferred it. It is true that a negotiable note is distinguished from other property in this, that possession in the usual course of business carries the property with it. Miller v. Race, Collins v. Martin, Mason v. Waite.⁹ But this distinction does not apply except where the note is actually delivered. Peacock v. Rhodes; Story on Bailm. § 322, *et seq.* The note in suit was not given up to Stafford when he paid it; and he had notice before the failure of Brigham that he should not have paid it to Brigham. Coddington v. Bay,¹⁰ Bay v. Coddington. The payment of a note should be made to the person having it in his possession, with authority to receive payment. Brigham was not the holder of the note. It was among the private papers of Goodrich; and the want of possession on the part of Brigham was notice to Stafford that he paid at his peril. Bayley on Bills (Phillips & Sewall's 2d ed.), 320; Chitty on Bills (5th ed.), 358; Kingman v. Pierce,² Freeman v. Boynton.¹¹ The transaction between Stafford and

¹ This "case," being substantially reproduced in the opinion of the court, has been omitted. — ED.

² 17 Mass. 247.

³ 1 Fairfield, 251.

⁴ Yelv. 178, and notes.

⁵ 15 Mass. 409.

⁶ 12 Johns. 149.

⁷ 7 Greenl. 30.

⁸ 7 Bing. 246.

⁹ 17 Mass. 563.

¹⁰ 20 Johns. 637, 655.

¹¹ 7 Mass. 483.

Brigham was in fact a sale at a discount ; and Stafford took as assignee, and subject to the rights of the real owner. *Peacock v. Rhodes*.

The payment to Brigham alone was not valid, the note having been deposited with Brigham and Goodrich. There can be no presumption that it was a partnership transaction, as Stafford took a receipt in the name of Brigham alone. *Gow*, 61 ; *Etheridge v. Binney* ;¹ *Collyer on Partn.* 228, 229. This receipt shows that the transaction was a mere personal executory contract between Stafford and Brigham.

If the note in suit had passed to a stranger without notice of such payment, he could have recovered upon it ; and there is no reason why the plaintiff should be bound by the transaction.

As Stafford extended confidence to Brigham alone, he should bear the loss rather than the plaintiff.

Allen and Barton, for the defendants. The receipt given by Brigham and Goodrich shows that the note in suit was placed in their hands as collateral security for the payment of notes lodged with them for collection, as attorneys. There is no evidence that this right to hold the note in suit was ever transferred from Brigham and Goodrich to Goodrich alone ; and the court cannot presume such a transfer merely from the circumstance that the note was found among the private papers of Goodrich.

It is said that the note was not paid in the ordinary course of business, as the payment was made before the maturity of the note. We contend that the payment of a note before it is due is as good as a payment after its maturity.

The plaintiff reposed confidence in Brigham and Goodrich originally, by depositing with them the note indorsed in blank ; and subsequently, by permitting it to remain in their hands a long time after the notes for which it was held as collateral security had been paid. The loss has been owing to this misplaced confidence ; and it ought therefore to fall upon the plaintiff.

SHAW, C. J., delivered the opinion of the court. The facts of this case present a very important question for the consideration of the court. Whatever affects the negotiability and the free currency of promissory notes and bills of exchange is of the utmost importance to a mercantile community, the business of which is to a great extent transacted through the medium of these instruments.

The facts which may be deemed material are these : The plaintiff became the holder of the note in question by regular indorsement for valuable consideration, soon after it was made, being a note dated September 1, 1833, payable in three years, with interest, and the last indorsement being in blank. Within a year from the date of the note,

¹ 9 Pick. 274.

to wit, in March, 1834, the plaintiff, John Wheeler, as surety, joined with Daniel G. Wheeler in three promissory notes, — one to Brigham & Goodrich, attorneys and partners, in Worcester; one to Tappan & Co.; and one to Stewart & Co., of New York, for both of which parties Brigham and Goodrich were agents and attorneys. On that occasion, the plaintiff, John Wheeler, delivered to Brigham and Goodrich, as collateral security to his three joint and several promises, the note in question, indorsed in blank, and took their receipt, specifying that it was so received, and to be by them held as collateral security for the payment of those notes. In September, 1835, these three notes had been fully paid. Though Brigham and Goodrich were in partnership as attorneys-at-law, yet Brigham was engaged in much other business, and had many separate negotiations; and the business in question had been done in the partnership name, but in fact by Goodrich. In December, 1835, the plaintiff applied to Goodrich for the note, who then produced and exhibited it from a file of private papers, where it had been kept by him; and he would then have given it up to the plaintiff, but the plaintiff had not his receipt with him to exchange for it. In the mean time, before this application of the plaintiff to Goodrich, viz., on the 28th of November, 1835, Brigham had received of Stafford, one of the firm of A. H. Guild & Co., and one of the defendants, \$500, to pay the note in question, describing it as a note payable in September, 1836, and gave him a receipt, in his separate name, signed D. T. Brigham, stating that the \$500 had been received in full payment of the note, and the note to be delivered up to Stafford. Soon after the application of the plaintiff to Goodrich above stated, viz. about the 24th of December, Stafford, one of the defendants, producing Brigham's receipt, applied to Goodrich for the note, who declined giving it, on the ground that Brigham had no right to receive pay for and discharge the note; and, by mutual consent, it was placed in the custody of a gentleman, for the use of the party having the better title to it, by whom it was produced in this court on the trial.

Some inferences are to be drawn from this evidence, which may have a bearing on the case; but we think they are plainly deducible from the circumstances stated, and they are these: that Goodrich did not assent to the payment received by Brigham, and did not in fact know of it till after he had been applied to by the plaintiff for the note; that Goodrich had the actual possession and custody of the note; and that, at the time that Brigham received the money and gave the receipt, he not only did not produce or exhibit the note, but that he had not the actual custody of it, nor was it so amongst the partnership papers, as that it was in the actual joint custody of the parties as partners. If he had it in his possession, or had regular access to it, in the

ordinary way of business, there is no reason why he did not deliver it up to Stafford, instead of giving him a receipt and a promise to deliver it.

The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them, for valuable consideration, in the ordinary course of business, when payable to bearer, or indorsed in blank so as to be transferable by delivery; and, in general, a party taking such a bill, under such circumstances, has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business, his title is good, and he shall be entitled to receive the amount. *Miller v. Race*, *Peacock v. Rhodes*, *Grant v. Vaughan*. The credit which the law thus attributes to notes and bills of exchange which are transferable by delivery arises mainly from the confidence inspired by the actual custody and possession, and the actual delivery of the security upon such negotiation. To so great an extent is this principle carried, that, in regard to bank-notes, and in most respects in regard to all other bills and notes transferable by delivery, the title and the possession are considered to be inseparable. And it will be presumed that the party thus in possession of a bill holds it for value until the contrary appears; and the burden of proof is on the party impeaching his title. *Collins v. Martin*.

But these rules are adopted with this limitation, that the party thus taking the note or bill does it in the ordinary course of trade, when not overdue or otherwise dishonored by any thing apparent upon the face of it, and without notice that it had been lost or stolen, or that the holder had obtained it wrongfully, or had no just right to receive it in the way of business. *Paterson v. Hardacre*.¹ If one takes a note or bill with actual notice that it has been lost by the owner, he cannot hold it against the true owner. *Lovell v. Martin*.²

It has been argued that, where a party has a legal title by indorsement and delivery, and the actual possession of the bill or note, although he holds without any just right to negotiate or collect it, still, as he has a legal title, a transfer from him will vest a legal title in another, and authorize such other to take for his own use. But this consequence, we think, does not follow. The true ground is expressed by *Eyre, C. J.*, in the case above cited, *Collins v. Martin*. He says: "For the purpose of rendering bills of exchange negotiable, the right of property passes with the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable; and in

¹ 4 Taunt. 114.

² 4 Taunt. 799.

this respect they differ essentially from goods." In another part of his judgment, in assigning the reason why a person thus having a legal title may not enforce the collection of the bill, whether he has given value for it or not, he says: "If it can be proved that the holder gave no value for the bill, then he is in privity with the first holder, and will be affected by every thing that affects the first. This all proceeds upon an *argumentum ad hominem*. It is saying, you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." The same reasoning applies to other cases, where a party has the custody of a bill, without any just right or lawful authority to collect or negotiate it, as where it has been lost or stolen, or embezzled from the true owner, or intrusted to an agent for a special purpose only. If these facts are known to the party receiving it, he is in privity with the party from whom he receives it, and cannot be heard in a court of justice, though having a legal title to enforce an inequitable and unjust demand. Such a case is not within the reason of the rule, which is designed only to protect bills and notes, when taken in good faith, in the course of business. If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that known to the party paying, though the note be given up, it is no discharge against the true owner. *Kingman v. Peirce*.¹

So payment of a bill or check before it is due will not be a discharge, unless made to the real proprietor of it; and therefore, where a banker, contrary to usage, paid a check the day before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing it. *Da Silva v. Fuller*. In this case, although the holder had the legal title arising from the possession of the check, yet he was not, *bona fide*, the holder with authority to collect; and as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it.

Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer

¹ 17 Mass. 241

it; otherwise, he shall not be deemed to have a good title to hold and enforce payment of it, or to withhold the bill itself or the proceeds of it from the party justly entitled. *Bleaden v. Charles*.¹ The same rule applies to payments. If a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder, mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If, therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment; and if it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be a payment in his own wrong, — he must pay the bill again to the right owner, and must seek his redress against the party receiving his money, on the pretence that he had a right to receive it as the holder of the bill, when in fact he had no such right.

Applying these principles to the present case, the court are of opinion that the payment made by Stafford to Brigham, under the circumstances, did not operate as a payment and discharge of this note, and that the plaintiff is entitled to recover.

The plaintiff was the holder of this note by indorsement before it was pledged to Brigham and Goodrich, and had the complete legal and equitable title to it, and the whole beneficial interest in it. Being transferable by delivery, when transferred to Brigham and Goodrich, they took the legal title, with a right to collect it, and apply the proceeds to the payment of the notes, for the security of which it was pledged, if they should not be otherwise paid. But, when those notes were paid, all right of Brigham and Goodrich to transfer or collect it ceased, and they had the mere naked possession of it for the plaintiff, to be surrendered on demand. Now, whatever might have been the effect of an actual surrender and delivery of this note to one of the promisors, on receiving payment, it is very clear that, according to all the rules applicable to this subject, without surrendering and delivering up the note, the payment must be considered as made at the risk of the party paying; and, as the party receiving, in fact, had no right to receive payment, such payment and receipt did not discharge the note, as against the true owner. It is not necessary to consider

whether Brigham was acting in his partnership capacity or not; because, after the purpose was accomplished, for which the note was pledged to the partners, they had no just right or lawful authority to transfer or collect the note, as against the plaintiff. If they had jointly transferred it in the due course of business, although their transferee, without notice, might have held it, it would be in virtue of the law which protects such transfers to a party without notice, in order to give effect to the currency of bills and notes, and not because Brigham and Goodrich had any right or lawful authority. If, therefore, they had given a transfer in writing with a promise to deliver the note, not delivering or producing it, no title would have passed as against the plaintiff, because such transfer, without delivery, would not be within the reason or principle of the rule.

But we think the other point is equally decisive. Brigham not only did not produce or exhibit the note, but he had not the actual custody or possession of it. He did not profess to act for the partnership, but signed the receipt in his own name. Had Brigham and Goodrich, as partners, been the true holders of the note, or if they had had a joint authority to collect it, it may well be admitted that the act of one or the receipt of one would bind both. But all the right and authority which they ever had over the note, except to give it back to the plaintiff, agreeably to their contract, had ceased. A receipt of one, therefore, in his own name, and not purporting to be for the use of both, was not within the scope of the partnership authority, and did not bind his partner. The defendant, Stafford, gave credit to Brigham only. For though his receipt purports to be, not merely executory, but a present discharge of the note, yet as he had no authority to discharge it, either by himself or for himself and partner, and as he had not the note to surrender and give up, the legal effect and operation of his receipt was an executory undertaking that he would procure a discharge of the note, and surrender it. The consequence is that Stafford paid his money to the wrong person, and must look to him for an indemnity.

Besides, the note was not paid in the due course of business. It was paid many months before it was due. The full sum was not paid, there being more than two years' interest due on the notes, which was wholly relinquished. No notice was given to Goodrich, the partner who transacted the business, of taking these notes and giving the receipt for them, and who had the actual custody of this note, — all of which would be strong evidence to go to a jury, to establish the fact of constructive notice to Stafford that Brigham had no right, either in his own name or as a partner with Goodrich, to receive payment of or to discharge this note. But the other grounds are sufficient, without relying upon these circumstances.

The grounds upon which the court place their judgment are these : The plaintiff had once a good title to the note. It was delivered to Brigham and Goodrich for a special purpose, which was accomplished. After that, Brigham and Goodrich had a mere naked custody of the note for the plaintiff, and had no right or lawful authority either to negotiate or collect it : *a fortiori*, Brigham alone had no such authority. The defendant Stafford was not lawfully called upon to pay Brigham, as having the possession and custody with a *prima facie* title, because he had no such custody or possession, and the note was not due. Stafford was not deceived into taking the note by the production and delivery of it, because it was not delivered or produced : if he paid it therefore to Brigham, without having up his note, he did it on the faith that Brigham had good right to receive payment and discharge it, and of course under the liability to pay it over again to the rightful proprietor, if Brigham had not such right. In fact and law, Brigham had no such right ; but the plaintiff was at the time the rightful proprietor, and of course the defendants obtained no discharge by such payment, but, upon the maturity of the note, they were bound to pay it to the plaintiff. The note having been put by Mr. Goodrich into the hands of a common friend, for the use of the party entitled, and the plaintiff having shown himself entitled, the note was rightly brought in by the person to whom it was thus intrusted, as evidence for the plaintiff.

*Judgment for plaintiff.*¹

JOSHUA PRAY v. SEBEUS C. MAINE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH
TERM, 1851.

[Reported in 7 Cushing, 253.]

THIS was an action of assumpsit. The defendant filed in set-off a promissory note for \$100, payable to Chandler & Maine, or their order, signed by the plaintiff, and indorsed "Chandler & Maine to Wingate," underneath which indorsement appeared the name of "Andrew T. Wingate," erased.

At the trial in the Court of Common Pleas, before Perkins, J., it appeared that the signature of Andrew T. Wingate, mentioned in the indorsement, was put on the note for a good consideration, at the time that the note was signed by Pray, and before it was delivered to

¹ Coffman v. Bank of Kentucky, 41 Miss. 212, accord. — ED.

Chandler & Maine ; to whom it was given for the purpose of securing the payment of expenses incurred and services performed by them as attorneys in relation to the proceedings upon an application for the benefit of the insolvent laws, which Pray was about to make. Wingate afterwards paid \$81 in full of said services and expenses, and Chandler & Maine thereupon surrendered the note to him, and made the indorsement above mentioned. At the time the note was made, Wingate owed Pray \$100, \$50 of which he had since paid ; so that after he had paid the \$81 to Chandler & Maine, Pray owed Wingate \$31. Wingate then sold and delivered the note to Maine for \$31, without indorsing it.

The judge, at the request of the plaintiff, ruled that the defendant could not avail himself of this note in set-off to the plaintiff's demand, to which ruling the defendant excepted.

Joel P. Bishop, for the defendant.

F. W. Sawyer, for the plaintiff.

SHAW, C. J. No title is shown by the defendant to the note relied upon as a set-off. Wingate, though he put his name on the back of the note, was still a promisor to Chandler & Maine, as settled in *Hunt v. Adams*.¹ The note was therefore extinguished, by payment by a promisor, who could not again put it in circulation as against a co-promisor. The only right that Wingate derived, or could derive, from the payment thus made by him as surety and co-promisor, was to claim the amount of Pray for money paid at his request, and for his use ; and that right was not negotiable.

*Exceptions overruled.*²

SAMUEL J. CHAPMAN v. CAROLINE M. KELLOGG.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1869.

[*Reported in 102 Massachusetts Reports, 246.*]

CONTRACT on a promissory note made by the defendant, April 6, 1866, under her maiden name of Caroline M. Fisk, for \$200, payable on demand to the order of the plaintiff. Writ dated January 14, 1868. The answer admitted the making of the note, and alleged that the defendant afterwards married Nathaniel Kellogg, who was still living, and that he paid the note.

¹ 5 Mass. 358, & 6 Mass. 519.

Conf. *Hopkins v. Farwell*, 32 N. H. 425 ; *Holliman v. Rogers*, 6 Tex. 91. — ED.

At the trial, in the Superior Court before Vose, J., there was evidence that the defendant married Nathaniel Kellogg in July, 1866, and lived with him until January 1, 1867, when he left her; and that he was still living, but never afterwards returned to her; that she never paid the note or furnished means to pay it; and that, between October 24, 1866, and January 1, 1867, difficulty arose between her and her husband.

There was also evidence that, on October 20, 1866, the plaintiff made demand on her to pay the note, and she replied that she had no means to do so, and referred him to her husband; that, on October 24, 1866, the plaintiff proposed to the defendant's husband that he should buy the note, and he agreed to do so, "provided the plaintiff would indorse it, and take it back in case of any difficulty between him and his wife;" that the plaintiff agreed to these terms, and, on receiving from the defendant's husband the amount due on the note, delivered it to him indorsed by himself, and saw nothing more of it until September, 1867, when the defendant's husband called on him to take it back, and he did so, and paid the defendant's husband for it.

The defendant requested the judge to rule that, "if the defendant's husband, at the request of his wife, paid to the plaintiff the amount due on the note, it was payment for the defendant, and extinguished the debt, and the note could not be again put in circulation as a valid note to any party having notice of these facts;" and also that, "if the note was paid by and transferred to the defendant's husband, it was a payment and extinguishment of the debt, and the note could not be again put in circulation as a valid note."

The judge declined so to rule, and instructed the jury as follows: "If the defendant's husband, at the request of his wife, paid to the plaintiff the amount due on the note, intending to extinguish the debt, that was payment of the note for the defendant, and extinguished the debt; and the note could not be again put in circulation as a valid note to any party having notice of these facts. The purchase by and transfer of the note to the husband under an agreement with the plaintiff that the husband should hold the note, and that the plaintiff should pay back the money and resume possession and control of the note, if desired by the husband; and a retransfer and sale of the note by the husband to the plaintiff, in pursuance of this agreement, would not extinguish the debt, and prevent the plaintiff from maintaining the present suit."

The jury found for the plaintiff; and the defendant alleged exceptions.

C. A. Winchester, for the defendant.

H. W. Bosworth, for the plaintiff, besides cases cited in the opinion, cited *Stearns v. Bullens*¹ and *Russ v. George*.²

CHAPMAN, C. J. The note in suit was originally valid, having been given to the plaintiff by the defendant while she was *sole*. When she married Kellogg, it remained valid against her; but, under our present statute, her husband did not become liable to pay it. Gen. Sts. c. 108, § 8.

According to the plaintiff's testimony, he sold it to her husband, and indorsed it to him, and thus the husband acquired the legal as well as the equitable title to it. The agreement that the plaintiff should take it back in case of any difficulty between the defendant and her husband did not prevent the title from vesting absolutely in the husband; for the husband was under no obligation to return it, except at his own option.

The question presented is whether this title in the husband operated to extinguish the contract. At common law, there can be no doubt that it would have done so. One of the reasons for the extinguishment would be that the husband became liable by the marriage for its payment. The statute has taken this ground away by releasing the husband from his liability for his wife's debts. But another ground was that he could not maintain an action against his wife on a contract, because there could be no valid contract between them. This principle has not been changed by statute. A contract between husband and wife is still a nullity. *Lord v. Parker*,³ *Edwards v. Stevens*,⁴ *Ingham v. White*.⁵ He cannot even indorse a note to her. *Gay v. Kingsley*.⁶

This note, then, when it passed into the hands of the defendant's husband, he having the legal as well as equitable title to it, became a nullity. And, it having been once extinguished, he had no power to revive it against her by retransferring it to the plaintiff. The question here decided is different from that decided in *Bemis v. Call*.⁷

Exceptions sustained.

¹ 8 Allen, 581.

² 45 N. H. 467.

³ 3 Allen, 127.

⁴ 8 Allen, 315.

⁵ 4 Allen, 412, 415.

⁶ 11 Allen, 345.

⁷ 10 Allen, 512.

GEORGE ABBOTT v. CHARLES A. WINCHESTER AND
ANOTHER, ADMINISTRATORS.IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER
TERM, 1870.

[Reported in 105 Massachusetts Reports, 115.]

CONTRACT against the administrators of the estate of Rodolphus Converse, on a promissory note made by him, dated August 25, 1856, and payable on demand to Maria Clark or order. The note was given in payment for services rendered to the maker by the payee, and was left in the hands of the attesting witness, for the benefit of the payee. The maker and payee intermarried, September 24, 1856. After the marriage, the note remained in the hands of the witness for some time, and then was delivered to the maker, who held it for the benefit of the payee some years, and until a few weeks before his death, when he delivered it to her. She then for the first time had the note in her personal possession. After her husband's death, she indorsed the note to the plaintiff. The case was submitted, on the above facts, to the judgment of the Superior Court; and, on appeal, of this court.

M. P. Knowlton, for the plaintiff.

C. A. Winchester, for the defendants, was not called upon.

CHAPMAN, C. J. The note in suit was given by Rodolphus Converse, the defendants' intestate, to Maria Clark, August 25, 1856. It was given in payment for services rendered to the maker by the payee, and was left in the hands of the attesting witness. On the 24th of the following month, the parties intermarried; and some time afterwards it was delivered to the maker, who kept it for the benefit of his wife till a few weeks before his death.

The principle stated in *Chapman v. Kellogg* must govern this case. The note became a mere nullity, and could not be revived by the death of the husband.

*Judgment for the defendants.*¹

¹ *Jackson v. Parks*, 10 Cush. 550, *accord*.

Richards v. Richards, 2 B. & Ad. 447; *Sykes v. Chadwick*, 18 Wall. 141 (*semble*), *contra*.

Conf. Murray v. Glasse, 23 L. J. Ch. 126.

So a note made by a husband to wife is a nullity. *Ingham v. White*, 4 All. 412.
— Ed.

In re SOUTHER. — Ex parte TALCOTT.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, MARCH, 1874.

[Reported in 2 Lowell, 320.]

PROOF OF DEBT. — PAYMENT BY SURETY. — This was a question upon evidence certified by the register, concerning the debt offered for proof by Frederic Talcott, and called for a decision whether the amount paid by an indorser of a note, after the bankruptcy of the maker, and after an affidavit in due form had been made by Talcott for proving the debt, but before the first meeting of the creditors, and therefore before the debt could be admitted to proof, should be deducted from the debt as a payment *pro tanto*. The case was not argued.

LOWELL, J. The general rule undoubtedly is that the holder of a note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule, that what he has received from one party, or from dividends in bankruptcy of one party to the note, are payments which he must give credit for, if he afterwards proves against others. *Sohier v. Loring*,¹ *Ex parte Wildman*,² *Ex parte The Royal Bank of Scotland*,³ *Ex parte Tayler*.⁴ I am of opinion that this latter rule must be confined to cases in which the payment has been made by the person primarily liable on the note or bill. The two cases last above cited cover the whole ground of this inquiry. In the former, it was held that such credit must be given for dividends received after a claim had been made in bankruptcy, but before the debt was actually and formally proved; and, in the latter, that when such payments had been made by the drawer of a bill of exchange and the proof was offered against the acceptor, still the credits must be given. One of the learned justices, however, in giving judgment, reserved his opinion whether the rule would apply if the holder offered his proof as a trustee for the drawer, or for the estate of the drawer. The theory of this decision is that no creditor can prove for more than his actual debt, as it exists at the time of proof, without obtaining an undue advantage over other creditors. The answer attempted to be maintained by the creditor in that case was that a holder may sue for the whole debt at law against the party primarily

¹ 6 Cush. 537.

³ 2 Rose, 197.

² 1 Atk. 109.

⁴ 1 DeG. & J. 302.

liable, and hold the money for whom it may concern. For this position, he cited *Jones v. Broadhurst*, then recently decided. The court of appeal in bankruptcy expressed doubts whether *Jones v. Broadhurst* stated the true rule at law, and decided that the rule in bankruptcy, at all events, was well settled against it, unless, perhaps, the holder proved that he was acting as trustee for some one whose liability was subsequent to that of the bankrupt.

It seems to me, however, that the argument in favor of the proof in full was sound. The better opinion at common law is that payment by a drawer or indorser does not exonerate the acceptor or maker, unless the promise of the latter was for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment, or unless he has made it at the request or for the benefit of the acceptor or maker. Byles on Bills (10th ed.), 221, and cases there cited. If this be not the rule at law, still I consider it to be so in bankruptcy. The statute, sect. 19, adopting the equities of the case, declares that if a surety, or other person liable for a bankrupt (and this undoubtedly includes indorsers), pays or satisfies the debt, or if he remains liable for the whole or any part of it, he may prove it 'in bankruptcy, or require the creditor to prove it, in order that he may have the benefit of the dividends. This law does not expressly meet the present case, because the indorsers here have neither satisfied the debt, nor do they remain liable to pay it, but they have taken an intermediate course, by paying a part for a full release of their own liability. Under these circumstances, in the absence of any stipulation one way or another about the maker of the note, who was already a bankrupt, the law will imply that the holder is to prove the whole debt; and, if the dividends are more than enough to pay him in full, after crediting to the surety what he has received from him, the creditor will hold the surplus for the benefit of the surety. This, though not within the exact language of sect. 19, is fully within its spirit. It is not, however, as a construction of that section that I find the law, but merely that the section recognizes a familiar equity, and takes for granted that a creditor may prove the debt, notwithstanding payment in whole or in part by a surety, because he in fact proves as the trustee of the surety. The payment made by the indorser after the maker of the note was a bankrupt cannot be proved by the surety as money paid, unless it comes precisely within sect. 19, because it had not been paid at the time of the bankruptcy. It must either be provable as part of the note in the hands of the holder, and for the benefit of the indorser, or not provable at all, and in the latter case it would not be barred by the discharge. This was one of the motives for the enactment that the surety may compel the

creditor to prove; and it takes for granted, as I have said, that the creditor might prove voluntarily. The case of *Jones v. Broadhurst*, and those which follow it on the one side, or differ from it on the other, deal merely with the fact, or the presumption, whether or not the payment is intended to discharge the debt of the principal debtor: if not, the right of action remains good. The fact in this case is that the surety gave a certain sum for what is equivalent to a covenant not to sue him, and it is not for the bankrupt to say that his debt is thereby paid, when he has not furnished the means to pay it.

*Proof admitted in full.*¹

¹ *Ex parte De Tastet*, 1 Rose, 10; *In re Ellerhorst*, 5 N. B. R. 144; *Ex parte Harris*, 2 Lowell, 568, *accord*.

Cooper v. Pepys, 1 Atk. 106; *Ex parte Leers*, 6 Ves. 644; *Ex parte Worrall*, 1 Cox, 309; *Ex parte Tayler*, 1 De G. & J. 302; *In re Oriental Bank*, L. R. 6 Eq. 582; *In re Howard*, 4 N. B. R. 571, *contra*, are not to be supported.

On the other hand, a partial payment of a bill by any party to it enures to the benefit, and is a discharge *pro tanto*, of the liability of all subsequent parties. Consequently, any payment or dividend received by the holder from a prior party before proof in bankruptcy against a subsequent party must be deducted from the amount of the claim provable against the latter. *Ex parte Ryswick*, 2 P. Wms. 89; *Ex parte Wyldman*, 2 Ves. Sr. 115; 1 Atk. 109, s. c.; *Ex parte Royal Bank*, 2 Rose, 197; *In re Weeks*, 13 N. B. R. 263; *Sohier v. Loring*, 6 Cush. 537; *Blake v. Ames*, 8 All. 318; *Nat. Bank v. Porter*, 122 Mass. 308.

The two classes of cases above cited are obvious, illustrating by the rules of law that a partial payment by one who is primarily liable upon an instrument is a satisfaction *pro tanto* of the obligation of those who are secondarily liable thereon; while a partial payment of one who is secondarily liable is no satisfaction whatever of the obligation of the primary debtor.

Nor is there any exception to the applicability of this rule of law in case of bills and notes accepted or made for the accommodation of drawers or indorsers. The acceptor or maker is by the very nature of the obligation the primary debtor with a collateral right of indemnity from the drawer or indorser. Accordingly, if the holder receives a partial payment from the drawer or indorser, he may still *prove* for the full amount of the bill or note against the accommodation acceptor or maker; but in order to prevent circuity of action, the courts would doubtless permit the holder to receive no greater dividend than would, together with the partial payment of the drawer or indorser, make up the full amount of the bill or note. *Conf. supra*, 819, n. 2; *Cook v. Lister*, *supra*, p. 844.

On the other hand, if the holder receives a partial payment from the accommodation acceptor or maker, and subsequently proves against a drawer or indorser, he is entitled only to the dividends upon the difference between the full amount of the bill or note and the partial payment. It is true that he may nominally make his proof against the drawer or indorser for the full amount, but in such a case he proves in fact as a trustee for the acceptor or maker to the extent of the partial payment. *In re Howard*, 4 N. B. R. 571; *Downing v. Trader's Bank*, 2 Dill. 136. In so far as *In re Baxter*, 18 N. B. R. 497, is inconsistent with this view, it seems to give the holder undue advantage.

It may be added, that no payment by a prior party *after* proof made against a subsequent party will affect the amount upon which the holder is entitled to receive a dividend from the latter. *Ex parte Wyldman*, 1 Ves. Sr. 115; 1 Atk. 109, s. c.; *In re Weeks*, 13 N. B. R. 263; *Sohier v. Loring*, 6 Cush. 537. But see *contra*, *Ex parte Lefebvre*, 2 P. Wms. 407; *In re Howard*, 4 N. B. R. 571.—ED.

A P P E N D I X.

HARVEY v. CANE.

IN THE HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION, FEBRUARY 2, 1876.

[Reported in 34 *Law Times Reporter*, 64.]

GROVE, J.¹ I am of opinion that the rule ought to be discharged. The facts, so far as they are material, are, that the defendant, having transactions with Clippingdale, accepted a bill, which was perfect, except that the drawer's name was not on it. The bill was sent to him by Clippingdale, and he accepted it and returned it. The words "for value received in corn" appeared on the face of the bill. Clippingdale handed the bill to the plaintiff, and it is admitted that the plaintiff was a holder for value and without notice. He inserted his own name as drawer, and sued the defendant on the bill. The question which arises is, whether on the issue raised by the plea of *non accepit* the plaintiff is entitled to recover. It was contended that, although if the plaintiff had been an indorsee for value without notice in the case of a bill drawn in the ordinary way, he might have sued, yet he could not sue in the present case, for he had no right to insert his own name as drawer. This line of argument admits that Clippingdale had a right to insert a drawer's name, and the plaintiff had no notice of any conditions attaching to the bill. The case, therefore, depends, first, on the question whether, if the drawer's name is not inserted, anybody who gets the bill fairly is *prima facie* entitled to insert his own name as drawer and put the bill in force, and secondly, whether, under the circumstances of the present case, the plaintiff had such authority. I am of opinion that he had. The reasonable inference to draw is that there was power to negotiate the bill; there were no conditions or circumstances tending to show the contrary, or to show that Clippingdale only had authority to insert his own name. Not only had Clippingdale power *prima facie* to deal with the bill, but it was entrusted to him without conditions, and the correspond-

¹ All that is material to an understanding of the case being contained in the opinion of Grove, J., the remainder of the case has been omitted. — Ed.

ence shows that the defendant contemplated that Clippingdale should use the bill as valid. The plaintiff received the bill from Clippingdale, and it seems therefore that the plaintiff had authority to insert his own name and put the bill in force. If any thing more than implied authority be necessary, and I do not say that it would be, the case comes within the principle of what is said by Maule, J., in *Montague v. Perkins*, "The defendant, when he wrote his name in blank and issued this acceptance, must have known what was obvious to anybody, that he put it in the power of any person to whom he gave it to fill it up and pass him off as having accepted the bill for any amount at any time warranted by the stamp. He must be taken to have intended the natural consequence of his act." Here it was put in Clippingdale's power to pass off the defendant as having accepted the bill, and therefore every word of what Maule, J., says there would apply to the present case. I agree with Mr. Prentice that *Cruchley v. Clarence* does not go quite the length in favor of the plaintiff here that Mr. Channell contended it did, but at the same time it is a strong authority. There it was held that a bill issued with a blank for the payee's name might be filled up by a *bona fide* holder with his own name, and would bind the drawer. Lord Ellenborough said, "As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant by leaving the blank undertook to be answerable for it when filled up in the shape of a bill." Le Blanc, J., says, "It is the same thing as if the defendant had made the bill payable to bearer," and Bayley, J., "The issuing of the bill in blank without the name of the payee was an authority to a *bona fide* holder to insert the name." Some argument to show that the case is distinguishable from the present may be based on the expression used by Le Blanc, J., but the other judgments make the case a strong authority for the plaintiff's right to recover. *Schultz v. Astley*,¹ is also a strong authority to the same effect, and Sir John Byles, quoting that case, observes: "It is not even necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance" (Byles on Bills, 11th ed. p. 187). That is applicable here where the acceptor handed the bill to Clippingdale. A question might arise whether, supposing without the authority of the acceptor, but by accident or in consequence of some fraud, the bill were to come into the hands of a *bona fide* holder for value, he would be entitled to insert his own name as drawer and sue upon the bill, but it is unnecessary to decide this, as it does not arise here. *Stoessiger v. The South-Eastern Railway Company*,²

¹ 2 B. N. C. 544.

² 3 E. & B. 549.

might be an authority under such a state of facts as I have alluded to, but it is distinguishable from this case, for there the bill was imperfect when lost; it was only a piece of paper. On that case, Erle, C. J., rests his judgment in *M'Call v. Taylor*. In *Awde v. Dixon*, what was called a bill was only a preliminary document for the purpose of forming a different bill from that on which the defendant was sued; the person who obtained an advance from the plaintiff on the bill had no authority to deal with it, and perhaps was a forger. It is not necessary to decide whether, if the instrument were filled up without authority, and afterwards came into the hands of a *bona fide* holder for value, the acceptor could be sued on it, or rather whether, as Mr. Channell contends, he would *prima facie* be liable. Here the facts were that the bill was given in order that it might be put into circulation, and Clippingdale gave what authority he himself had to the plaintiff, who thereby acquired a right to sue.

*Judgment for the plaintiff with costs of motion and of action.*¹

ANNE DRUMMOND v. CREDITORS OF JAMES DRUMMOND.

IN THE COURT OF SESSION, SCOTLAND, FEBRUARY 8, 1785.

[Reported in *Morrison's Dictionary of Decisions*, 1445.]

JAMES DRUMMOND subscribed as the acceptor of a bill drawn in these terms: "Against Martinmas next, pay to Anne Drummond, or order, the sum of 1035 merks, for value." But there was no subscription of the drawer.

¹ *Moiese v. Knapp*, 30 Ga. 942, *accord*.

Scard v. Jackson, 34 L. T. Rep. 65, note *a*. [In the High Court of Justice, Common Pleas Division, Nov. 8, 1875. This was a case tried before Denman, J., at the Monmouthshire summer assizes. The plaintiff, Eleanor Scard, sued as the administratrix of Thomas Williams on a bill of exchange accepted by the defendant. The bill in question had a blank space left for the drawer's name, and came into possession of the plaintiff, Eleanor Scard, as administratrix, after it was overdue. She inserted her own name as drawer. The learned judge directed a verdict for the plaintiffs, with leave to move.

Powell, Q. C. (*Jelf* with him) moved to enter the verdict for the defendant, on the ground (amongst others) that the plaintiff Eleanor Scard had no right to put her own name on the bill as drawer. He cited Byles on Bills, p. 323, latest edit.; *Montague v. Perkins*.

The Court (Grove, Denman, and Archibald, JJ.) were of opinion that the plaintiff was entitled to insert her name as drawer and sue on the bill as administratrix, and refused a rule.]. *Fair v. Cranston*, Mor. Dict. Dec. 1677; *McDonald v. Rankin*, Court of Session, June 13, 1817, *accord*. — Ed.

It was objected by the other creditors of James Drummond, that a bill not subscribed by the drawer, though accepted, could not be sustained as a ground of debt.

But as the creditor's name was inserted in the body of the bill in question, and thus there occurred all the essential requisites of a promissory note, the Court repelled the objection.¹

RUSSELL *v.* LANGSTAFFE.

IN THE KING'S BENCH, NOVEMBER 22, 1780.

[*Reported in 2 Douglas, 514.*]

ONE Galley having had frequent money transactions with the plaintiff, who was a banker, and having overdrawn his cash account, the plaintiff suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve. Upon this, Galley applied to the defendant, and he indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank; *i. e.*, without any sum, date, or time of payment, being mentioned in the body of the notes. Galley afterwards filled up the blanks with different sums and dates, as he chose, and the plaintiff discounted the notes. One of them was made pay-

¹ *Smith v. Taylor*, Court of Session, Feb. 27, 1824. [Smith was in use of accommodating Nisbet with blank bill stamps signed by him. One of these Nisbet delivered to Taylor, for the purpose of retiring his acceptance to Taylor, for £50, then lying due at the Commercial Bank. The stamp was filled up by Taylor, in Nisbet's presence, for £86, the former signing as drawer, and Nisbet as co-acceptor with Smith. Taylor then indorsed the bill so filled up, to the bank in payment of Nisbet's acceptance of £50, and delivered to Nisbet the balance of £36. Nisbet having become bankrupt, Taylor retired the bill, and charged Smith for payment. He brought a suspension, on the grounds, 1. That Taylor having filled up and signed the blank bill as drawer, and being in the knowledge that it was granted for the accommodation of Nisbet, must be held to have come exactly into his place, and consequently was not entitled to the privileges of an onerous holder, who had acquired the bill after it was filled up; and 2, That the bill was null as a blank writ, under the act 1696, c. 25. It was answered for Taylor, 1. That though he was in form the drawer of the bill, he had truly advanced value for it, and was therefore the creditor in the bill, and entitled to the privileges of an onerous holder; and 2. That the act 1696 did not apply to bills of exchange. The Lord Ordinary found the letters orderly proceeded, and the Court adhered.]

The Court were of opinion, that if a holder had truly given value for a skeleton bill, it was of no consequence whether he appeared on it in the character of drawer or indorser. — ED.

able on the 22d of September, two on the 27th of September, and two on the 4th of October. These notes not being paid when they became due, the plaintiff on the 14th of October, called upon the defendant, as indorser, for the payment of all of them, and upon his refusal, brought this action, which was tried, before Hotham, Baron, at the last assizes for the county of Durham. It appeared that Galley had become a bankrupt on the 20th of September, and that, on the 27th, the defendant had been present at a meeting of his creditors. It also appeared that Russell knew the notes were blank at the time of the indorsement. The plaintiff and the defendant lived in the same town.

For the defendant, at the trial, it was objected, 1. That these notes being blank at the time of the indorsement, they were not then promissory notes, and that no subsequent act of Galley could alter the original nature or operation of the defendant's signature, which, when it was written, was a mere nullity. It was also objected, 2. That the notice of the non-payment by the drawer, was not given soon enough to the indorser.¹

The judge being of opinion with the defendant on the first point, he directed the jury accordingly, and they found a verdict for him.

On Wednesday, the 8th of November, Arden obtained a rule to show cause, why there should not be a new trial; which was argued this day, by the Attorney General, Lee, and Scott, in support of the verdict, and Dunning for the plaintiff.

1. The Attorney General gave up the first point, but Lee said he thought it of consequence enough to be argued. It never had been determined, he said, and deserved consideration. The copper-plate checks in this case, without sum or date, were mere waste paper, and Langstaff's name upon them had no more effect than if written on any other blank piece of paper. An indorsement supposes a bill, or promissory note, then actually existing; and if a party take an indorsed bill or note, knowing, at the time, that it was not the subject of an indorsement when the name was written on the back of it, he is not injured if he is afterwards told that he shall not be permitted to treat it as a bill or note. The very declaration, in this action, necessarily states a pre-existing note, previous to the indorsement; and such forms are not to be considered as useless, and without a meaning. How can the plaintiff be permitted to say that, by this signature, the defendant contracted for a given sum, when he knows that, at the time of the signature, he did not contract for any thing? This

¹ So much of the case as relates to the question of diligence has been omitted. —
ED.

defence might not be competent, as against a third person, but it seems just and fair, as against the plaintiff, who was aware of the original nature of the transaction.

On the other side *Dunning* insisted that there could not be a doubt but the direction was wrong. It strengthened the plaintiff's case, that he knew the notes were blank when indorsed. For what purpose could he suppose the indorsements were made by the defendant, but to authorize Galley to fill them up with any sum he pleased, and to bind himself, as his security, to that extent. The declaration states the notes to have been made before the indorsements; so all declarations against indorsers must; but the defendant, by indorsing them, concluded himself from contending or proving, that they were not filled up when he signed them.

LORD MANSFIELD. There is nothing so clear as the first point. The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, "Trust Galley to any amount, and I will be his security." It does not lie in his mouth to say, the indorsements were not regular. The direction having been wrong on this point, it is needless to go into the other.

*The rule made absolute.*¹

MERTENS *v.* WINNINGTON.

AT NISI PRIUS, CORAM LORD KENYON, C. J., MARCH 4, 1794.

[*Reported in 1 Espinasse, 113.*]

ASSUMPSIT against the defendant as drawer of a bill of exchange.

The bill in question was drawn by the defendant on Carrioni in Italy, in favor of Webbould: Webbould indorsed it to Burton, Forbes, and Gregory, they sent it to their correspondent in Holland, who sent it to Italy, where it was presented to Carrioni for payment, who refused it; upon which the plaintiffs, who were merchants resident at Venice paid the bill for the honor of Burton, Forbes, and Gregory, and now brought their action against the defendant as drawer.

The counsel for the defendant contended, that where a bill is taken up for the honor of any of the parties whose names are on it, that such person only shall be liable.

But Lord Kenyon was of opinion, that where a bill is so taken up, that the party who does so, is to be considered as an indorsee paying

¹ *Violett v. Patton*, 5 Cranch, 142; *Douglass v. Scott*, 8 Leigh, 43; *Orrick v. Colston*, 7 Grat. 189, *accord.* — ED.

full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill, and he therefore directed the jury to find a verdict for the plaintiff.¹

Ex parte LAMBERT.

IN CHANCERY, BEFORE LORD ERSKINE, C., DECEMBER 5, 6, 1806.

[Reported in 13 Vesey, 179.]

IN 1792 Adams and Co. merchants at New York, having considerable dealings with Lane, Frazer, and Boylston, of London, drew two bills upon them: one dated the 18th of October, at 120 days' sight for 158*l.* 16*s.*: the other dated the 5th of December, at ninety days' sight for 600*l.* The bills were accepted. The first that came due being dishonored, both bills were taken up by the petitioner for the honor of the drawers, upon the 22d of February, 1793. On the 20th of April, 1793, a commission of bankruptcy issued against Lane, Frazer, and Boylston. Adams and Co. also failed; and proceedings took place in America for the purpose of dividing their estate among their creditors; under which the petitioner received a dividend of 4*s.* 2*d.* in the pound upon the bills he had taken up. The commissioners under the commission of bankruptcy against Lane, Frazer, and Boylston, rejecting his proof for the balance, on an affidavit of one of the bankrupts, that they had no effects, and the bills were for the accommodation of the drawers, the petition was presented, praying that he may be admitted to prove.

Mr. *Richards* and Mr. *Cullen*, in support of the petition. The Solicitor General Sir *Samuel Romilly*, against it. The case *Ex parte* Wackerbath² was cited in support of the petition, and was disapproved by the Lord Chancellor.

Dec. 6th. The Lord Chancellor, ERSKINE. I continue of the opinion I expressed yesterday. Upon this affidavit there is no doubt, that if Adams and Co. had themselves been plaintiffs in an action, the acceptors of these bills might as against them have insisted, that the bills were drawn merely for the accommodation of the drawers; and they had no effects; though that would not have been an answer to an indorsee for valuable consideration, without notice. Then what is this case? A bill, accepted, being dishonored, is taken up for the

¹ Fairly *v.* Roch, Nels. Lut. 274 (*semble*); Cox *v.* Earle, 3 B. & Al. 430; Goodall *v.* Polhill, 1 C. B. 233; Konig *v.* Bayard, 1 Pet. 250, *accord*.

See *Ex parte* Wyld, 2 De G., F. & J. 642. — ED.

² Ves. 574.

honor of the drawer by the petitioner. The effect is, that he has a clear right, as against the drawer. So he has a right to stand in the place of the drawer; but cannot make a title stronger than that of the drawer; and oust the assignees of the bankrupts of the defence, which they would have against him. *The petition was dismissed*¹

MILLER v. CRAYTON, APPELLANT.

IN THE SUPREME COURT, NEW YORK, APRIL TERM, 1874.

[Reported in 3 Thompson & Cook, 360.]

APPEAL from a judgment in the Cayuga County Court affirming a judgment of a justice's court in favor of plaintiff. The action was brought by Adam Miller as a purchaser and holder of a promissory note for \$66, dated May 3, 1866, payable April 1, 1866, and purporting to be executed by the defendant, David Crayton. The plaintiff purchased the note of the payee's agent May 9, 1866. The defendant denies the making of the note, and says that it is a fraud and a forgery, and that the plaintiff is not a *bona fide* holder of the note. Defendant admitted having made a note for \$64. The remaining facts appear in the opinion.

¹ *Gazzam v. Armstrong*, 3 Dana, 554; *McDowell v. Cook*, 14 Miss. 420, *accord*.

In *re Overend*, L. R. 6 Eq. 344, *contra*.

In the last case Sir R. Malins, V. C., said: "In every point of view, therefore, I am obliged to come to the conclusion that though *Ex parte Lambert*, 13 Ves. 179, may be considered as having been law in accordance with the current of authorities when Lord Erskine decided it, although it does not seem that even that proposition can be maintained when the facts are looked at, yet it is so wholly opposed to the more modern authorities that it is in fact completely overruled by them.

"It is singular that, under these circumstances, none of the subsequent authorities have professed in terms to overrule *Ex parte Lambert*, but they have nevertheless effectually done so by a current of decisions in direct opposition to it, and it certainly is, I must say, very remarkable that this case, completely overruled by a current of authorities extending over more than half a century, continues to be cited in all the text-books — Chitty, Bayley, and even Mr. Justice Byles' book — as if it were still law, although the same books cite the authorities that have in principle completely overruled it. *Ex parte Lambert* is the case referred to for the proposition of law, which, I am bound to say, shows that it is the habit of even the best text-writers to take these things for granted one after another. . . . The person who takes up a bill *supra protest* for the honor of a particular party to the bill, succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honor he takes it up, and that he cannot himself indorse it over." See to the same effect the opinion of Lord Eldon in *Ex parte Wackerbath*, 5 Ves. 574. — ED.

F. D. Wright, for appellant.

James Lyon, for respondent.

GILBERT, J. Putting the evidence in a light most favorable to the defendant, there was enough to warrant a verdict that the note in suit was made by him. He and his witnesses gave as the only reason why the note was not made by him, that it was for sixty-six instead of sixty-four dollars. Such discrepancy may have arisen innocently in many ways, and is insufficient to shake our belief that the note is a genuine instrument.

The only other material question in the case is, whether the plaintiff is a *bona fide* holder for value and entitled to protection against the defence that the note was fraudulently obtained by the payee.

The plaintiff testifies that he gave for the note ninety per cent only of the amount thereof. But this fact, it seems, does not make him a holder in bad faith. *Williams v. Tilt*.¹ This case practically overrules the previous cases, where a contrary doctrine had been asserted; *Ramsdell v. Morgan*,² and *Krutzer v. Parks*,³ and holds, that a man may be a purchaser, *bona fide*, notwithstanding the transfer to him was tainted with usury. The note is dated May 3, 1866, and purports on its face to be payable April 1, 1866. Literally, therefore, it was overdue when the plaintiff purchased it. But the evidence clearly established that the time of payment agreed upon by the parties to the note was April 1, 1867, and there can be no question that it was competent to prove this fact by parol. No doubt the terms of the note were sufficient to put the plaintiff upon inquiry, and so operated as a notice to him. The question is, what is the extent of that notice? We have held at this term (*Weeks v. Fox*,⁴) that when a note was signed by an agent, it was notice to the holder that the person who made the note was acting under a power, and that he was bound to inquire and ascertain what the actual authority was; but that he was under no obligation to inquire into the consideration of the note. So here the plaintiff had notice, that the time of payment specified in the note was not the true one. He was, therefore, bound to inquire and ascertain the time when, in fact, it was payable. The legal presumption is, that he did make that inquiry, and that he ascertained the fact to be as it really exists. He was not bound to inquire further. The result is, that he must be treated as a *bona fide* holder for value, and without notice of the fraud set up in defence.

With respect to the other questions presented by the appellant, we

¹ 36 N. Y. 319.

³ 2 Sandf. 60.

² 16 Wend. 564.

⁴ 3 Th. & C. 354.

need only say, that we have found no error in the proceedings below.

The judgment should be affirmed, with costs.

*Judgment affirmed.*¹

¹ *Boehm v. Sterling*, 7 T. R. 432; *Drake v. Rogers*, 32 Me. 524; *Cowing v. Altman*, 71 N. Y. 435, *accord*.

HUSTON v. YOUNG.

IN THE SUPREME JUDICIAL COURT, MAINE, 1851.

[*Reported in 33 Maine Reports*, 85.]

ON report from the District Court, RICE, J.

ASSUMPSIT, by an indorsee against the maker of a note bearing date January 14, 1847, payable in two years from date with interest.

The defence was, that the suit commenced Oct. 8, 1849, was premature.

It was agreed that, if the testimony is admissible, the defendant can prove that the note was made January 14, 1848, and that the figures 1847, in the date, were inserted by mistake instead of the figures 1848. Whether that testimony was admissible, against objection by the plaintiff, was the question submitted for decision; the defendant having agreed, that if it was not admissible, a default should be entered.

Lowell, for the plaintiff.

Ruggles & Gould, for the defendant.

WELLS, J. The question presented in this case is, whether the defendant can be permitted to show, that the note in suit was antedated by mistake, and that the time of payment had not elapsed when the action was commenced.

The plaintiff presents the note in evidence duly indorsed, and the legal presumption is, that it was indorsed before it became due. *Ranger v. Cary*, 1 Metc. 369. The plaintiff is therefore to be considered as having taken the note before it was payable according to its terms, and there is no evidence, that he is not a *bona fide* holder and purchaser for a valuable consideration. He had no knowledge of any mistake in the date, and had a right to consider it as correctly written. He was authorized to regard the note as a true exposition of the contract between the original parties, and he cannot be prejudiced by any error in it, arising from their mistake of which he was ignorant. The testimony offered was inadmissible, and a default must be entered.

Defendant defaulted. (a) — ED.

(a) See *Tobey v. Chipman*, 13 All. 123; *Cowing v. Altman*, 71 N. Y. 435. — ED.

In re EUROPEAN BANK. *Ex parte* ORIENTAL COMMERCIAL BANK.

IN CHANCERY, BEFORE SIR G. M. GIFFARD, L. J., JANUARY 29, FEBRUARY 8, 18, 1870.

[*Reported in Law Reports, 5 Chancery Appeals, 358.*]

THIS was an appeal from an order of the Vice-Chancellor Malins dismissing a summons taken out by the Oriental Commercial Bank with reference to certain bills drawn on and accepted by the European Bank, which was now in course of winding up, but able to pay its debts in full. The Eastern Commercial Bank were the holders of the bills, but the Oriental Commercial Bank claimed the proceeds on the ground that the bills were bought with their moneys by one Demetrio Pappa; that the Eastern Commercial Bank had notice of this through Demetrio Pappa; and that, whether they had notice or not, they could stand in no better position than Demetrio Pappa would have stood if he had not parted with the bills, because they were overdue when he transferred them.

The bills in question were bought by Demetrio Pappa on the 21st of March, 1867, for 15s. 4d. in the pound. They were at that time overdue. Demetrio Pappa had an account with the National Bank of Scotland in the name of George John Pappa, a relation of his, which account, in his affidavits, he alleged to be his own. On the 19th of March, 1867, a sum of £2,594 6s. 1d. was paid into this account, and on the 21st of March a sum of £2,300 was drawn out and applied in the purchase of the bills in question, along with bills of the Oriental Commercial Bank for £2,000.

In 1866, after a petition, upon which an order for winding up the Oriental Commercial Bank was afterwards made, had been presented, D. Pappa, who was the manager of the bank, sent out G. J. Pappa to Patras, as he alleged, on his private business, but, as he admitted, with instructions also to receive the debts due to the bank and to settle its debts. He denied that the bills of the European Bank were purchased with moneys of the Oriental Commercial Bank collected abroad by G. J. Pappa, and the Vice-Chancellor, upon the evidence before him, considered that, although there was great reason to suspect that D. Pappa had made the purchase with assets of the Oriental Commercial Bank, it was not proved with sufficient distinctness that he had done so, and that the case of the applicants therefore failed.

On the appeal motion the Oriental Commercial Bank adduced fresh

evidence which proved most indisputably that the £2,594 6s. 1d. paid into the account of G. J. Pappa on the 20th of March, 1867, was made up of two sums of £2,094 6s. 1d. and £500, and that the larger of these two sums arose from assets of the Oriental Commercial Bank which G. J. Pappa had collected abroad, and had handed over to D. Pappa on his return.

The Eastern Commercial Bank was a limited company, of which Demetrio Pappa was the promoter. It was registered on the 4th of April, 1867, under a memorandum of association dated the 2d of April, and articles dated the 4th of April, in that year. Pappa was the managing director, and until July, 1867, he was the only director. He sold the bills in question to the Eastern Commercial Bank on the 6th of April, 1867, at 16s. in the pound, and paid himself for them by a check which he, as managing director, drew on the funds of that company.

Mr. *Jackson*, and Mr. *W. W. Karlake*, for the Oriental Commercial Bank, in support of the appeal motion:—

The money with which these bills were purchased is proved to have been our money, and D. Pappa could not hold them as against us.¹ . . . But if the Court is against us as to notice, still the circumstance that the bills were overdue when bought is equivalent to notice: *Esdaile v. La Nauze*,² *Holmes v. Kidd*, *Coltenridge v. Farquharson*,³ *Ex parte Swan*.⁴

Mr. *Pearson*, Q.C., and Mr. *Locock Webb*, for the Eastern Commercial Bank.

No doubt the indorsee of an overdue bill takes it subject to its equities, but they must be equities attaching to the bill, equities between the holder and the drawer or acceptor. No other equity is recognized. This is the result of the cases which are collected in *Ex parte Swan*; and *Charles v. Marsden* contains strong dicta showing that the equity goes no further.

THE LORD JUSTICE GIFFARD. Why is not an equity between the indorser and a third party to be enforced?

The law, we submit, is, that it is not to be enforced, nor is it expedient that it should.

Mr. *W. W. Karlake*, in reply.

Feb. 18. SIR G. M. GIFFARD, L. J., after stating the facts and reviewing the evidence, continued:—

I have read the evidence at some length in consequence of the

¹ The counsel for the appellant here contended that notice to Pappa was notice to the Eastern Bank.—ED.

² 1 Y. & C. Ex. 394.

³ 1 Stark. 259.

⁴ Law Rep. 6 Eq. 344.

nature of the charge, and I do not hesitate to say that it is proved to demonstration that the £2,094 6s. 1d. was the amount arising from the discount of bills belonging to the Oriental Commercial Bank, and that this, with a sum of £500, forms the sum which appears in the trust account under date of the 19th of March as a sum of £2,594 6s. 1d., and that the sum of £2,300 under date the 21st of March, on the other side of the account, was drawn out and applied in the purchase of the bills from Melas Brothers, of which the bills in question, amounting in all to £1,000, formed part, the rest being bills for £2,000 on the Oriental Commercial Bank. To speak plainly, and in such a case there ought to be plain speaking, Demetrio Pappa has sworn that which is not true, and has applied to his own purposes the moneys arising from the discount of bills, which bills, he knew, belonged to the Oriental Commercial Bank. A grosser fraud there cannot be. Now at all events the facts have been proved, and it remains to be seen what the law is as applicable to these facts. The bills and moneys belonging to the Oriental Commercial Bank were not received either by George John Pappa or Demetrio until after the presentation of the petition for winding up that bank; therefore no question of account as between the bank and Demetrio Pappa arises. The £237 paid over by John George Pappa to the liquidator has nothing to do with this matter; it is in no way concluded by any receipt given by or settlement of accounts with the official liquidator; and if the bills in question were now in the hands of Demetrio Pappa, beyond all question the Oriental Commercial Bank could follow their moneys into them, and assert a right to a proportional part of the proceeds. Is then the Eastern Commercial Bank in any better position than Demetrio Pappa would have been? In my opinion they were not affected with notice through Demetrio Pappa. He purchased the bills before the Eastern Commercial Bank was formed. He stood in the relation of vendor to that bank, and though he was managing director and something more, and paid himself by check, he is not in the position of a partner in an ordinary firm, but of agent acting for the bank as principal. He cannot be taken to have disclosed his own fraud: *Kennedy v. Green*¹ therefore applies.

But the want of notice is not conclusive on the case. The bills were overdue when the Eastern Commercial Bank took them, there were equities affecting the bills, and the Eastern Commercial Bank has no better title, either legal or equitable, than Demetrio Pappa had. The law on this subject cannot be better stated than is done by Vice-Chancellor *Malins* in his judgment in *Ex parte Swan*.²

¹ 3 My. & K. 699.

² Law Rep. 6 Eq. 359, 360.

In this case there is an equity attaching directly to the bills. The result therefore is that the Oriental Commercial Bank can follow their moneys into the bills in the possession of the Eastern Commercial Bank, precisely in the same way as though Demetrio Pappa had not parted with them. I have not calculated the exact amount which was applied in payment of these bills, but as the amount applied in payment of them and the other bills was £2,300, and the £2,300 was drawn against a sum of £2,594 6s. 1d., which was made up of a sum of £2,094 6s. 1d. belonging to the Oriental Commercial Bank and of £500 belonging to Demetrio Pappa, and it must be taken according to the case of *Pennell v. Deffell*,¹ that these two sums contributed ratably, it will follow that the Oriental Commercial Bank is entitled to so much of the proceeds of the bills as is represented by their proportion of the purchase-money, and the Eastern Commercial Bank to so much as is represented by the £500; the proportion will be somewhere about four-fifths and a fraction, and a fraction less than one-fifth. There will be a declaration to this effect and payment accordingly. The amounts can be calculated.²

The order of the Vice-Chancellor will be discharged, and the order I have suggested substituted for it. If the additional evidence had been before him, I gather from his judgment that his order would have been the same as that which I now make.³

¹ 4 D. M. & G. 372.

² The remainder of the opinion relating to a question of costs has been omitted.
— Ed.

³ *Crosby v. Tanner*, 40 Iowa, 136; *Hibernian Bank v. Everman*, 52 Miss. 500 (*semble*), *contra*.

Conf. *Warren v. Haight*, 65 N. Y. 171.

If the holder of a bill is induced by fraudulent representations to transfer it, and the fraudulent transferee in his turn transfers it after maturity even to a purchaser for value without notice, the innocent purchaser stands in no better position than his fraudulent predecessor. But see *Etheridge v. Gallagher*, 55 Miss. 458 (*semble*), *contra*. — Ed.

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